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No. 07-(D)

In the Supreme Court of the United States

AHMAD B. NURRIDDIN,
Petitioner,
v.

MICHAEL GRIFFIN, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL M. THOMPSON
Counsel of Record
KELLY M. FALLS
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, as interpreted by this Court in *National Railroad Passenger Corp. v. Morgan*, 526 U.S. 101 (2002), requires a plaintiff to repeatedly amend or renew an administrative charge to exhaust subsequent acts of discrimination or retaliation that relate to allegations already included in the original charge.

PARTIES TO THE PROCEEDINGS BELOW

The parties to this proceeding are the same as in the proceedings before the circuit court: petitioner Ahmad B. Nurriddin and respondent Michael Griffin, in his official capacity as Administrator of the National Aeronautics and Space Administration ("NASA"). Griffin was substituted in place of his predecessor, Daniel Goldin, during the course of proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Ahmad B. Nurriddin respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is available at *Nurriddin v. Griffin*, 222 F. App'x 5 (D.C. Cir. 2007) (unpublished), and is reprinted at App. 1–3. The orders of the court of appeals denying rehearing and rehearing en banc are reprinted at App. 63–64 and App. 65–66 respectively.

The court of appeals affirmed the decision of the United States District Court for the District of Columbia, which is available at *Nurriddin v. Goldin*, 382 F. Supp. 2d 79 (D.D.C. 2005), and reprinted at App. 4–62.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the District of Columbia Circuit entered its judgment and opinion on April 16, 2007, and denied Petitioner's timely petition for rehearing and rehearing en banc on July 2, 2007. Petitioner's application to extend the time to file a petition for writ of certiorari until November 29, 2007, was granted by Chief Justice Roberts on September 26, 2007. Supreme Court Dkt. No. 07A262. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

42 U.S.C. § 2000e-5(e)(1) provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * *.

29 C.F.R. § 1614.105 provides in pertinent part:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of race * * * must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within forty-five days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within forty-five days of the effective date of the action.

STATEMENT OF THE CASE

In February 1995, petitioner Ahmad B. Nurriddin filed a charge with NASA's Equal Employment Office ("EEO"), alleging, *inter alia*, that NASA had failed to promote him because of his race. After the EEO provided him with a right to sue letter, Nurriddin did so, once again raising claims of discriminatory and retaliatory non-promotion under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In his complaint, however, Nurriddin

alleged that NASA's failure to promote him continued through December 1996, more than 20 months *after* the date of his original charge with the EEO.

The district court dismissed these non-promotion claims, holding that Nurriddin failed to exhaust them by filing a charge with the EEO. App. 22. Although Nurriddin argued that he had exhausted his claims because they were directly related—indeed, nearly identical—to the claims already raised in his February 1995 EEO charge, the district court rejected this argument. Relying on this Court's decision in *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101 (2002), the court explained:

> *Morgan* has been understood . . . to bar recovery for discrete acts occurring *after* the filing of an administrative complaint, when a plaintiff does not file a new complaint or amend the old complaint but instead presents these acts for the first time in federal court.

App. 22 (emphasis added). Applying this reading of *Morgan*, the district court concluded that Nurriddin had not raised his non-promotion claims with the EEO and, therefore, could not raise them for the first time in federal court. *Id.* Nurriddin appealed this decision to the United States Court of Appeals for the District of Columbia, which affirmed in an unpublished opinion. App. 1–3.

The court of appeals' decision warrants this Court's immediate review. At present, the courts of

appeals are deeply divided over whether Title VII plaintiffs, like Nurriddin, must separately exhaust claims based on related post-charge conduct. *Compare Wedow v. City of Kansas City*, 442 F.3d 661, 673–674 (8th Cir. 2006) (holding plaintiff need not file a separate charge for related post-charge conduct), *with Martinez v. Potter*, 347 F.3d 1208, 1210–1211 (10th Cir. 2003) (holding plaintiff must file a separate charge for related post-charge conduct). This conflict among the circuits has caused significant confusion in the lower courts and undermines the uniform enforcement of Title VII and other civil rights laws. To resolve this split, end the current chaos in the lower courts, and put to rest an issue of national importance, this Court should grant this petition and reverse the decision of the court of appeals.

1. Title VII forbids covered employers from discriminating "against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII further prohibits employers from retaliating against employees who engage in "protected activity," such as complaining about discriminatory behavior through internal mechanisms or by filing a formal charge with the Equal Employment Opportunity Commission ("EEOC"). *Id.* § 2000e-3(a).

Under Title VII, employees subjected to unlawful discrimination must exhaust their claim by presenting it to an administrative agency before initiating a lawsuit in federal court. *Id.* § 2000e-5(e)(1). Federal employees are subject to an additional requirement:

they must also contact an EEO Counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). The Counselor works with the employee to process the claim, investigate the allegations, and "informally resolve the matter" with the employer. 29 C.F.R. § 1614.105(a).

If counseling fails, the employee may file a formal charge with the EEO "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The EEO then investigates the claim, compiling documentary and testimonial evidence from the employee, the agency, and other employees of the agency. 29 C.F.R. § 1614.108(b)-(c). When the EEO completes its investigation, it issues a "right to sue" letter to the employee. 29 C.F.R. § 1614.110(a). Upon receipt of the letter, the employee has ninety days to initiate a private lawsuit in federal court. 42 U.S.C. §§ 2000e-5(f)(1) & 16(c). This employee must base his lawsuit on claims that have been exhausted through the administrative review process.

This Court explained the meaning of the exhaustion requirement in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In that case, this Court held that a Title VII claim based on discrete discriminatory acts is time-barred when the plaintiff fails to raise it in a charge with the EEOC within the 180-day period set forth in the statute. Before *Morgan*, a number of courts had permitted recovery for claims falling outside this 180-day bar, as long as those claims were "sufficiently related" to claims that were timely

exhausted. *E.g.*, *Berry v. Bd. of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). *Morgan* put an end to that rule in cases involving discrete acts occurring *before* the filing of a charge with the EEOC. *Morgan*, 536 U.S. at 113. *Morgan* did not, however, address whether related conduct occurring *after* the filing of an EEOC charge is exhausted by the filing of the original charge. That is the question presented by this case.

2. In May 1991, petitioner Ahmad Nurriddin, an African-American and Muslim male, was hired by respondent NASA as a GS-12 employee. Court of Appeals ("C.A.") App. 326. From the start, Nurriddin complained that NASA discriminated against him by classifying him at GS-12, rather than a higher pay grade. C.A. App. 484. By September 1991, Nurriddin had already informed his supervisors and the EEO that non-minority NASA employees were hired at higher pay grades and rapidly promoted while he was not. *Id.*

Nurriddin's promotion opportunities at NASA were governed by an accretion model. C.A. App. 475. Under this system, employees gradually take on the responsibilities of a higher pay grade during the normal course of their work and are promoted to that higher pay grade once they establish that they can capably handle the new responsibilities. *Id.* Under the accretion model, there is no formal process to request a promotion, nor is there any documented denial of a requested promotion. An employee who is denied promotion simply remains at his prior pay grade. *Id.*

In January 1993, Nurriddin met with his supervisors to complain that NASA had still not promoted him, even though he had assumed the responsibilities of higher-grade employees. C.A. App. 476. Nurriddin's supervisors assured him that NASA would promote him to GS-13 status upon completion of a new assignment: the Turner Plan. C.A. App. 476, 502. NASA had promoted Nurriddin's predecessor, a white, female employee, while she worked on the Turner Plan, without requiring her to complete the assignment. C.A. Supp. App. 861, 871. Nevertheless, in May 1995, when Nurriddin completed the Turner Plan, NASA again failed to promote him. C.A. App. 607.

At that time, Nurriddin was the last NASA project manager still classified as a GS-12; all other employees with similar job responsibilities were GS-14s. C.A. App. 382. Nurriddin remained at his initial classification until he was finally promoted to GS-13 status in November 1997—over two-and-a-half years after he completed the Turner Plan, and over six years after his original hire date. C.A. App. 369.

During this six-year period, Nurriddin filed two formal charges with the EEO. First, in February 1995, he alleged that NASA hired him at an unfair pay grade and kept him there without promotion for discriminatory and retaliatory reasons. App. 67–73. The EEO accepted Nurriddin's non-promotion claims for investigation, but rejected the discriminatory hiring claim as untimely. C.A. Supp. App. 876–877. Second, in April 1997, Nurriddin again alleged that NASA still had not promoted him for the same

discriminatory and retaliatory reasons alleged in his prior charge. C.A. Supp. App. 887–888. The EEO consolidated the two charges and issued a final agency decision on September 21, 1999, giving Nurriddin the right to file a civil action in federal court. C.A. App. 660–680.

3. On December 21, 1999, Nurriddin sued NASA in the United States District Court for the District of Columbia, charging it with violating Title VII by "continuously refusing and failing to promote" him because of discrimination and retaliation. C.A. App. 225, ¶¶148–152. At the time, Nurriddin was represented by counsel. On December 3, 2003, Nurriddin amended his complaint, this time proceeding *pro se*. C.A. App. 209–231. In this amended complaint, Nurriddin linked his discrimination and retaliation claims with his two EEO charges, alleging in one count that he was not promoted from May 1991 to September 1994[1] and in a second count that this non-promotion continued through December 1996. C.A. App. 217–218, 225–226.

The district court granted NASA's motion for summary judgment, holding that Nurriddin had failed to exhaust his administrative remedies with regard to his claims of non-promotion from September 1994 to December 1996. App. 22, 60.

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[1] Before filing his first EEO charge, Nurriddin contacted an EEO Counselor, as required by 29 C.F.R. § 1614.105(a)(1), on September 15, 1994. C.A. App. 98. His February 1995 charge thus properly exhausts all conduct that occurred after August 1, 1994—45 days before he contacted the counselor.

Specifically, the court denied Nurriddin's argument that the claims were properly exhausted because they "gr[e]w out of the earlier EEOC allegations." App. 21. In so holding, the district court relied upon this Court's ruling in *Morgan*. App. 22. Acknowledging that *Morgan*'s holding bars recovery based on discrete acts occurring *before* the statutory limitations period, the district court held that *Morgan* also barred "recovery for discrete acts occurring after the filing of an administrative complaint." *Id.* (citing *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003)).[2] The court, therefore, declined to address the merits of Nurriddin's discriminatory and retaliatory non-promotion claims from September 1994 to December 1996, holding that Nurriddin had failed to exhaust administrative remedies as required by Title VII. App. 44, 49 n.8.

4. On appeal to the Court of Appeals for the District of Columbia, both NASA and Nurriddin moved for summary disposition without argument. D.C. Cir. Dkt. No. 05-5386. The court of appeals denied both motions, and instead appointed Steven Goldblatt and the Georgetown Appellate Litigation Clinic as *amicus curiae* in support of Nurriddin. *Id.* Through both briefing and oral argument, Amicus stressed that Nurriddin had properly exhausted his non-promotion claims because they were related to and reasonably arose out of the conduct alleged in

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[2] The district court erroneously claimed that the District of Columbia Circuit issued this ruling, citing *Martinez* as a D.C. Circuit case. App. 22. The D.C. Circuit had not, at the time of the district court's decision, acknowledged or addressed the issue.

his 1995 EEO charge. Br. Amicus 23–26; Reply Br. Amicus 5–8. Amicus also specifically raised the district court's error in relying on *Morgan*, as interpreted by the Tenth Circuit in *Martinez*, to find Nurriddin's claims unexhausted. *Id.* Amicus pointed to a split between the Eighth and Tenth Circuits, and argued that the majority of courts did not read *Morgan* to require separate exhaustion of subsequent related acts. Br. Amicus 24–25.

On April 16, 2007, the D.C. Circuit affirmed the district court in an unpublished opinion. App. 1–3.

> The district court, after a thorough review of the evidence and the applicable legal standards, held that several of the claims were not fully exhausted. . . . Viewing the matter de novo, in light of the record, and the parties' briefs and oral argument, we agree.

App. 2–3. The court of appeals denied Nurriddin's petition for rehearing and rehearing en banc on July 2, 2007. App. 63–66.

REASONS FOR GRANTING THE PETITION

Since this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the courts of appeals have divided over whether a Title VII plaintiff must file a separate EEOC charge for unlawful conduct that is related to, but occurs *after*, the initial charge. For three compelling reasons, this Court should grant this petition and resolve this dispute.

First, the decision below deepens a pronounced circuit split about the proper interpretation of Title VII's exhaustion requirement. Most courts of appeals agree that claims based upon post-charge conduct are exhausted by the filing of the original charge, and that plaintiffs need not repeatedly amend or renew their charges to preserve their right to judicial review of such complaints. *See, e.g.*, *Wedow v. City of Kansas City*, 442 F.3d 661, 673–674 (8th Cir. 2006). Yet with its decision below, the D.C. Circuit appears to have sided with a minority of circuits, adopting the opposite rule. *See, e.g.*, *Martinez v. Potter*, 347 F.3d 1208, 1210–1211 (10th Cir. 2003). This unresolved dispute has spread throughout the lower courts, causing inconsistency in the application of Title VII and confusion among the circuits.

Second, this conflict poses a significant threat to the uniform application of civil rights laws. Already, the unresolved tension between the competing views is bleeding into other statutory regimes that look to Title VII for guidance, creating a widespread conflict that will only worsen with time. Only this Court's intervention can stem the tide, as the circuit courts have made clear that they will not independently resolve this dispute. This case presents an excellent vehicle for the Court to, once again, bring consistency to the interpretation of Title VII's exhaustion requirement, as it has done so often in the past. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Morgan*, 536 U.S. 101.

Finally, this Court should review the decision below because it misconstrues this Court's precedent

and imposes an absurd, cumbersome, and unworkable administrative burden upon Title VII plaintiffs. Properly understood, *Morgan* addresses only whether plaintiffs can revive ancient claims that are otherwise time-barred. That case, however, has no affect on the longstanding rule that once a plaintiff files a timely administrative complaint, the charge exhausts claims based on subsequent, related conduct as well. The lower court's holding abandons this simple rule in favor of a complex system of duplicative, unreasonable, and irrational procedural hurdles that are in no way compelled by the statute itself.

I. The Courts of Appeals Are Divided Over Whether Title VII Plaintiffs Must Separately Exhaust Claims Based Upon Related Post-Charge Conduct.

In the wake of this Court's holding in *Morgan*, the courts of appeals are in direct conflict regarding the application of Title VII's exhaustion requirement to post-charge conduct. Two courts of appeals have explicitly held that *Morgan* requires a Title VII plaintiff to amend an administrative charge to include subsequent discriminatory and retaliatory conduct in order to later raise those claims in federal court. A majority of the remaining courts of appeals, however, limit *Morgan*'s application to pre-charge conduct and permit plaintiffs to bring suit on any uncharged subsequent conduct that is reasonably related to charged conduct. Because administrative exhaustion is a threshold question in nearly every Title VII case, these diverging interpretations have

spawned inconsistency and uncertainty throughout the lower courts.

A. The Majority of Circuits Hold That Plaintiffs Need Not Separately Exhaust Claims Involving Related Post-Charge Conduct.

The majority view, held in whole or in part by at least seven courts of appeals, is that the filing of an EEOC charge administratively exhausts all claims involving subsequent, related, post-charge conduct. To date, four circuits—the First, Second, Eighth, and Ninth—have adopted this view in published opinions. Three others—the Third, Fifth, and Sixth, have done so in unpublished dispositions.

Of these seven circuits, two have held expressly that *Morgan* does not alter prior case law permitting Title VII plaintiffs to bring suit based on related post-charge conduct not alleged in an administrative charge. In *Wedow*, for instance, the Eighth Circuit considered a scenario virtually identical to Nurriddin's and held that *Morgan* did not require a new or amended administrative charge for related, post-charge conduct. 442 F.3d at 673–674. The plaintiffs in *Wedow* filed administrative charges in November 1997, alleging ongoing sex discrimination in their employment as firefighters. In suit in federal court, plaintiffs alleged continued discrimination and discrete retaliatory acts from 1998 through 2000. Over the city's objection that the subsequent conduct was not administratively exhausted, the Eighth Circuit held that post-*Morgan* "we have not wholly abandoned the theory that

reasonably related subsequent acts may be considered exhausted." *Id.* at 673. The court permitted the claims to proceed because "they were of a like kind to the retaliatory acts alleged in the EEOC charge, which were specified to be of an ongoing and continuing nature." *Id.* at 674.

A few years before *Wedow*, the Sixth Circuit reached a similar conclusion in *Delisle v. Brimfield Township Police*, 94 F. App'x 247, 252–254 (6th Cir. 2004) (unpublished). In that case, the Sixth Circuit addressed the complaints of a plaintiff who filed an EEOC charge in September 1999 and was demoted over a month later. The court rejected the argument that, under *Morgan*, it could not hear the demotion claim, stating "that is not the proposition for which *Morgan* stands." *Id.* at 252. Rather, the Sixth Circuit maintained that it could hear retaliation claims not alleged in an administrative filing "so long as they could reasonably [be] expected to grow out of the [existing] EEOC charge." *Id.* at 254 (alterations in original). The court permitted the claims to proceed, holding that "there is no legal precedent that precludes this Court from considering Plaintiff's subsequent adverse action." *Id.*

The First Circuit has agreed, noting in dicta that "*Morgan* does not address whether a previously filed EEOC complaint must be amended to encompass subsequent discrete acts in order to render such acts susceptible to judicial review." *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 188 (1st Cir. 2003). Over the past few years, courts throughout the First Circuit have reaffirmed the vitality of pre-*Morgan* case law permitting subsequent retaliation

claims to proceed without separate exhaustion. *Id.* (citing *Clokedile v. N.H. Dep't of Corr.*, 245 F.3d 1, 6 (1st Cir. 2001)); *see also Montalvo-Padilla v. Univ. of P.R.*, 498 F. Supp. 2d 464, 465 (D.P.R. 2007).

Without discussing *Morgan*, three other circuits have affirmed the continuing validity of their pre-*Morgan* jurisprudence and held that related post-charge conduct not raised in an EEOC charge is nonetheless properly exhausted. *See Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 178 (2d Cir. 2005); *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003); *Neiderlander v. Am. Video Glass Co.*, 80 F. App'x 256, 260 (3d Cir. 2003) (unpublished); *Lyons v. England*, 307 F.3d 1092, 1103–1105 (9th Cir. 2002). The Fifth Circuit has also reaffirmed its pre-*Morgan* position that, at a minimum, related post-charge retaliatory conduct is exhausted through filing of the original charge. *See Eberle v. Gonzales*, No. 06-50954, 2007 U.S. App. LEXIS 12488, at *15–16 (5th Cir. May 18, 2007) (unpublished).

Even the EEOC—the federal agency charged with interpreting and implementing Title VII—has reached the same conclusion. In its Compliance Manual, the EEOC instructs that "[a] timely charge also may challenge incidents that occur after the charge is filed." EEOC COMPLIANCE MANUAL § 2-IV (2005). In support of this proposition, the manual cites a well-established line of pre-*Morgan* circuit cases holding that post-charge conduct is exhausted if it is reasonably related to an earlier charge. *Id.* at

n.186.[3] It then concludes: "*Morgan* does not affect these decisions." *Id.* (favorably citing *Delisle*).

Thus, a significant majority of circuits that have considered the question—and the EEOC itself—all agree: by filing a charge with the EEOC, a Title VII plaintiff exhausts all claims based upon subsequent, reasonably related conduct.

B. The Tenth Circuit Has Held That Plaintiffs Must Separately Exhaust All Claims Involving Related Post-Charge Conduct.

Rather than follow this majority rule, the district court below relied upon the Tenth Circuit's decision in *Martinez*, 347 F.3d 1208. The *Martinez* court affirmed the dismissal of a plaintiff's discriminatory discharge claim because it arose after the filing of an EEOC charge and was not separately exhausted. While acknowledging that *Morgan* addressed only pre-charge conduct, the *Martinez* court

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[3] *Citing Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402–1403 (2d Cir. 1993) (recognizing several situations where claims not raised in an EEOC charge are sufficiently related to the allegations in a charge to permit those unraised claims to be included in a civil action); *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992) (retaliation claim for filing prior EEOC charge may be raised for the first time in federal court); *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986) (court action could encompass termination if it was sufficiently related to suspensions challenged in timely EEOC charge).

held that "[t]he rule is equally applicable, however, to discrete claims based on incidents occurring *after* the filing of Plaintiff's EEOC complaint." *Id.* at 1211–1212. Though *Martinez* left open the possibility that post-charge retaliatory acts might require a different rule, *id.* at 1211, subsequent Tenth Circuit cases have extended its holding to bar retaliation claims. *See Keeler v. Cereal Food Processors*, No. 07-3055, 2007 U.S. App. LEXIS 23834, at *8–10 (10th Cir. Oct. 10, 2007) (barring retaliatory discharge claim when discharge occurred one month after EEOC charge); *Dunlap v. Kan. Dep't of Health & Env't*, 127 F. App'x 433, 437–438 (10th Cir. 2005) (unpublished) (barring retaliation claims arising after filing charge).

Prior to the instant case, no other court of appeals had joined the Tenth Circuit and applied the *Martinez* rule.[4] Even the EEOC explicitly rejected the Tenth Circuit's interpretation, stating that "[t]he Commission disagrees with [*Martinez*]. Nothing in *Morgan* suggests that a new charge must be filed when a charge challenging related acts already exists." EEOC COMPLIANCE MANUAL § 2-IV, at n.186. By affirming the district court's decision in this case, however, the D.C. Circuit tacitly sided with the minority view.

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[4] *Martinez* has been followed, however, by several district courts in other circuits. See *infra*, Part I.C.

C. This Circuit Split Is Generating Confusion Throughout the Federal Judiciary.

The circuit split regarding the application of Title VII's administrative exhaustion requirement is causing turmoil throughout the lower courts, as district courts struggle to decide cases without clear guidance from this Court or the courts of appeals. Though many courts have clearly resolved the split at issue, others have sought to avoid the issue in creative ways. Unfortunately, as the split among the circuits has deepened, confusion, uncertainty, and inconsistency has been the order of the day throughout the federal judiciary.

1. Recent events within the D.C. Circuit demonstrate the problem. In *Weber v. Battista*, 494 F.3d 179 (D.C. Cir. 2007), for instance, the court of appeals explicitly identified the circuit split now at issue, *see id.* at 183–184 (citing *Martinez* and *Wedow*), but claimed to leave the issue unresolved. *See id.* at 184 ("In this case, we need not adopt either of the foregoing views."). Notwithstanding this statement, the *Weber* court proceeded to find a plaintiff's claim exhausted because it "could have reasonably been expected to grow out of" the earlier complaint—the exact rule adopted by the majority of circuits and pressed by Nurriddin below. *Id.* In other words, the court of appeals effectively resolved the circuit split over post-charge conduct, while denying it was doing so.

Any effort to rely upon *Weber*'s holding, however, quickly gives way. On two other occasions, the D.C. Circuit has reviewed and affirmed district court

decisions explicitly interpreting *Morgan* as applied to post-charge conduct. When placed side by side, however, these two affimances simply make no sense.

In *Velikonja v. Mueller*, 315 F. Supp. 2d 66, 74 (D.D.C. 2004), the district court found that a claim for discriminatory and retaliatory suspension was exhausted even though it arose three months after the plaintiff filed a charge with the EEOC. Interpreting *Morgan* to stand for the proposition that "the purpose of the exhaustion doctrine [is] to give the agency notice of a claim and [the] opportunity to handle it internally," *id.* at 74 (internal quotations omitted), the court concluded:

> [W]here the ends of administrative exhaustion have been served by the pursuit of administrative remedies with regard to the subsequent acts, separate initiation of administrative exhaustion for related post-complaint conduct is not required.

Id. Though the D.C. Circuit reversed the district court's decision regarding other counts on alternate grounds, it otherwise affirmed the district court's holding. *See Velikonja v. Gonzales*, 466 F.3d 122, 124 (D.C. Cir. 2006) (affirming "[i]n all other respects . . . for the reasons given in the District Court's thorough and well-reasoned opinions").

The D.C. Circuit affirmed the opposite conclusion, however, in the case now at issue. Unlike the district court in *Velikonja*, the lower court in this case held that *Morgan* "bar[s] recovery for dis-

crete acts occurring after the filing of an administrative complaint." App. 22–23. Again, the D.C. Circuit merely affirmed the district court's decision, stating that it "agree[d]" with the district court's analysis on all issues, including exhaustion. App. 3. Though the plaintiff in *Velikonja* was permitted to proceed to the merits of a virtually identical claim, Nurriddin was barred from doing so.

For obvious reasons, the D.C. Circuit's fractured approach to this issue has created significant confusion among the district courts. *See Jones v. Univ. of D.C.*, 505 F. Supp. 2d 78, 84–85 (D.D.C. 2007) (discussing post-*Weber* inter-circuit and intra-circuit split). As a result, a split has emerged among the district courts in the D.C. Circuit, with some applying the majority rule, while others have adopted the Tenth Circuit's minority view. *Compare Keeley v. Small*, 391 F. Supp. 2d 30, 40–41 (D.D.C. 2005) (holding subsequent retaliation claims not exhausted, citing *Martinez*), *and Romero-Ostolaza v. Ridge*, 370 F. Supp. 2d 132, 148 (D.D.C. 2005) (holding same), *and Coleman-Adebayo v. Leavitt*, 326 F. Supp. 2d 132, 138–139 (D.D.C. 2004), *with Hazel v. Wash. Metro. Area Transit Auth.*, No. 02-1375, 2006 U.S. Dist. LEXIS 89139, at *8 (D.D.C. Dec. 1, 2006) (holding subsequent retaliation claims exhausted, citing *Wedow*).

The D.C. Circuit's role as an important arbiter of Title VII claims means that this intra-circuit confusion has rapidly spread through the country, as other courts look to the D.C. Circuit for guidance. *See, e.g.*, *Wedow*, 442 F.3d at 673 (citing *Velikonja* and finding post-filing conduct exhausted); *McKenzie*

v. St. Tammany Parish Sch. Bd., No. 04-0420, 2006 U.S. Dist. LEXIS 53814, at *8–9 (E.D. La. July 17, 2006) (citing *Romero-Ostolaza* and finding post-filing conduct not exhausted); *Jordan v. U.S. Dep't of Educ.*, No. 1:05cv1066, 2006 U.S. Dist. LEXIS 29507, at *14 (N.D. Ohio May 10, 2006) (citing *Romero-Ostolaza* and finding post-filing conduct not exhausted). To date, however, the D.C. Circuit has failed to respond in any way that provides meaningful guidance to the lower courts.

2. Similar confusion appears throughout the other circuits as well.

The current state of affairs in the Ninth Circuit proves the point. In *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002), a precedential opinion, the Ninth Circuit held that plaintiffs are not required to separately exhaust claims based upon reasonably related post-charge conduct. *Id.* at 1104. Of the three Ninth Circuit district court cases addressing the question after *Lyons*, however, only one recognized that *Lyons* answered the question, while the other two relied upon the *Wedow* and *Martinez* circuit split to reach conflicting conclusions. *Compare Mertes v. Wynne*, No. CIV.S-06-1742, 2007 U.S. Dist. LEXIS 83112, at *26–27 (E.D. Cal. Oct. 26, 2007) (holding Ninth Circuit does not require separate exhaustion of post-filing conduct under *Lyons*), *with Roger-Vasselin v. Marriott Int'l Inc.*, No. C04-4027, 2006 U.S. Dist. LEXIS 52729, at *11–13 (N.D. Cal. July 18, 2006) (noting the "Ninth Circuit does not appear to have directly ruled on this issue" but finding claims exhausted, citing *Wedow*), *and McClendon v. Hewlett-Packard Co.*, No. CV-05-087,

2005 U.S. Dist. LEXIS 29449, at *9–10 (D. Idaho Oct. 27, 2005) (holding subsequent acts must be separately exhausted, citing *Martinez*).

Confusion reigns in the Third, Fifth, and Sixth Circuits as well. Although each court of appeals has sided with the majority rule in unpublished opinions, district courts in those circuits remain uncertain about the force and effect of those decisions. The result, once again, is inconsistency and confusion. *See Willis v. Vie Fin. Group, Inc.*, No. 04-435, 2004 U.S. Dist. LEXIS 15753, at *14 n.7 (E.D. Pa. Aug. 6, 2004) (declining to follow Third Circuit resolution in *Neiderlander* and applying the Tenth Circuit holding from *Martinez*); *Griggs v. Univ. Health Sys.*, No. SA-06-CA-0384, 2007 U.S. Dist. LEXIS 19277, at *8 n.1 (W.D. Tex. Mar. 7, 2007) (following Fifth Circuit resolution in *Miller v. Sw. Bell Tel. Co.*, 51 F. App'x 928 (5th Cir. 2002) (unpublished)); *Breech v. Scioto County Reg'l Water Dist.*, No. 1:03cv360, 2006 U.S. Dist. LEXIS 58545, at *14–16 (S.D. Ohio Aug. 21, 2006) (noting contrary unpublished Sixth Circuit cases in *Delisle* and *Sherman v. Chrysler Corp.*, 47 F. App'x 716 (6th Cir. 2002) (unpublished)).

Without clear guidance on the matter, the district courts inconsistently rely upon conflicting holdings, leaving six circuits divided among their own district courts as to how to apply *Morgan* to exhaustion of post-charge conduct.[5] With the

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[5] Third Circuit: *Compare Patsakis v. E. Orthodox Found.*, No. 04-1662, 2006 U.S. Dist. LEXIS 55330, at *18–22 (W.D. Pa. May 17, 2006), *with Allen v. Nat'l R.R. Passenger Corp.*, No. 03-cv-3497, 2005

circuits divided and the lower courts in disarray, this Court should provide a conclusive and final answer to this persistent question and end the inconsistent application of federal law.

II. The Question Presented Is a Matter of National Importance Requiring This Court's Immediate Intervention.

A. The Circuit Split Is Causing Confusion Under Other Statutory Schemes That Rely on Title VII Holdings.

The chaos created by the lack of a uniform rule regarding the administrative exhaustion of post-charge conduct has ramifications reaching far beyond Title VII. Title VII and its interpreting decisions serve as a procedural guidepost for a number of

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U.S. Dist. LEXIS 19624, at *31–32 (E.D. Pa. Sept. 9, 2005). Fifth Circuit: *Compare Griggs*, 2007 U.S. Dist. LEXIS 19277, at *8 n.1, *with McKenzie*, 2006 U.S. Dist. LEXIS 53814, at *8–9. Sixth Circuit: *Compare Jordan*, 2006 U.S. Dist. LEXIS 29507, at *14, *with Delisle*, 94 F. App'x at 252–254. Ninth Circuit: *Compare McClendon*, 2005 U.S. Dist. LEXIS 29449, at *9–10, *with Lyons*, 307 F.3d at 1104. Eleventh Circuit: *Compare Sumrall v. Potter*, No. 4:03cv103, 2007 U.S. Dist. LEXIS 29281, at *2–3 (N.D. Fla. Apr. 22, 2007), *with Casiano v. Gonzales*, No. 3:04cv67, 2006 U.S. Dist. LEXIS 3593, at *52–53 (N.D. Fla. Jan. 31, 2006). D.C. Circuit: *Compare Hazel*, 2006 U.S. Dist. LEXIS 89139, at *8, *with Adams v. Mineta*, No. 04-856, 2006 U.S. Dist. LEXIS 5783, at *11–12 (D.D.C. Feb. 16, 2006).

state and federal statutes. The circuit split at issue has predictably infected other statutory schemes that explicitly or by analogy rely on Title VII exhaustion holdings.

The exhaustion requirements of Title VII are statutorily incorporated by reference into the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12117(a), the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(d)(1). Therefore, courts construing the exhaustion requirements of those statutes have frequently relied on and applied this Court's Title VII jurisprudence, including this Court's holding in *Morgan*. *See, e.g.*, *Mayers v. Laborer's Health & Safety Fund*, 478 F.3d 364, 368 (D.C. Cir. 2007) (applying *Morgan* to ADA claim); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 239 (2d Cir. 2007) (applying *Morgan* to ADEA claim); *Horton v. Potter*, 369 F.3d 906, 909 (6th Cir. 2004) (applying *Morgan* to Rehabilitation Act claim). Courts also apply Title VII holdings by analogy to exhaustion requirements under the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 *et seq.*, as well as to a variety of state civil rights statutes. *See, e.g.*, *Willis*, 2004 U.S. Dist. LEXIS 15753, at *14 n.7 (applying *Morgan* to Sarbanes-Oxley); *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 986 (D.C. 2007) (applying *Morgan* to District of Columbia Human Rights Act); *Gallagher v. Bd. of Trs.*, 54 P.3d 386, 393 (Col. 2002) (applying *Morgan* to state whistleblower law).

As a result, unless this Court resolves the question presented, the rampant inconsistency that

has emerged in the wake of *Morgan* will continue to infiltrate other state and federal civil rights statutes. Indeed, state and federal courts applying Title VII exhaustion requirements to other statutes have already noted the circuit conflict, and are regularly adopting the minority view. *See McClendon*, 2005 U.S. Dist. LEXIS 29449, at *9–10 (finding Sarbanes-Oxley claim unexhausted, citing *Martinez*); *McElroy v. State*, 703 N.W.2d 385, 391 n.2 (Iowa 2005) (finding claim under Iowa Civil Rights Act unexhausted because "[a]t least one federal circuit court of appeals has abandoned the 'reasonably related' exception after *Morgan*"). This Court's intervention is therefore required to clarify not only the proper application of the exhaustion requirements in Title VII cases, but in all cases that rely upon the Title VII statutory regime.

B. The Split Is Firmly Entrenched, and Additional Delay Will Only Result in Uneven Protection of Civil Rights.

The pronounced circuit split presented by this case will not resolve itself without this Court's guidance. In *Wedow*, the Eighth Circuit explicitly acknowledged and rejected the Tenth Circuit's contrary holding in *Martinez* before it permitted post-charge conduct claims to proceed. 442 F.3d at 673. Yet in the face of this obvious controversy, the Tenth Circuit has dug in its heels, three times explicitly reaffirming and following *Martinez* as applied to post-charge conduct. *See Keeler*, 2007 U.S. App. LEXIS 23834, at *8–10; *Dunlap*, 127 F. App'x at 437–438; *Tucker v. Colo. Dep't of Pub. Health & Env't*, 104 F. App'x 704 (10th Cir. 2004)

(unpublished). By implicitly adopting the *Martinez* rule, the D.C. Circuit has made it even less likely that the circuits will independently reach consensus on this issue.

Meanwhile, each of the dominant views has gained widespread attention throughout the lower courts. For example, the Sixth Circuit's opinion in *Delisle*, although purportedly non-precedential, has been cited across six different circuits for its discussion of *Morgan*.[6] The Tenth Circuit's position in *Martinez*, despite its departure from the majority rule, has been cited in courts across nine circuits for its *Morgan* holding on post-filing conduct.[7] In six of these circuits, the district courts have split internally in resolving the question, in every instance citing *Martinez* in support of the minority position.[8]

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[6] *See, e.g.*, *Wedow*, 442 F.3d at 673; *Sumrall*, 2007 U.S. Dist. LEXIS 29281, at *2–3; *Spellman v. Seymour Tubing*, No. 1:07cv88, 2007 U.S. Dist. LEXIS 28779, at *7 (S.D. Ind. Apr. 12, 2007); *Griggs*, 2007 U.S. Dist. LEXIS 19277, at *8–9; *Breech*, 2006 U.S. Dist. LEXIS 58545, at *14–16; *Romero-Ostolaza*, 370 F. Supp. 2d at 149.

[7] *See, e.g.*, *Weber*, 494 F.3d at 184; *Keeler*, 2007 U.S. App. LEXIS 23834, at *8–9; *Wedow*, 442 F.3d at 673; *Allen*, 2005 U.S. Dist. LEXIS 19624, at *31–32; *Spellman*, 2007 U.S. Dist. LEXIS 28779, at *7; *Griggs*, 2007 U.S. Dist. LEXIS 19277, at *8–9; *Jordan*, 2006 U.S. Dist. LEXIS 29507, at *14; *Casiano*, 2006 U.S. Dist. LEXIS 3593, at *52–53; *McClendon*, 2005 U.S. Dist. LEXIS 29449, at *9–10.

[8] See *supra* note 5.

Such conflicts will only deepen with the passage of time.

The entrenchment of the circuit split and the courts of appeals' refusal to explicitly resolve the question in binding opinions is resulting in the uneven enforcement of important civil rights laws. Identical claims for workplace discrimination in violation of Title VII are dismissed or permitted to proceed based on the district in which they are filed.

Until this dispute is resolved, untrained litigants will remain trapped by the contradictory conclusions running throughout the administrative process. The EEOC explicitly takes the position that a "timely charge also may challenge incidents that occur after the charge is filed." EEOC COMPLIANCE MANUAL § 2-IV, at n.186 (2005). The EEOC regulations for federal employees also require that complainants be informed that the agency will investigate "issues or claims like or related to issues or claims raised in pre-complaint counseling." 29 C.F.R. § 1614.105 (b)(1). Yet even when plaintiffs proceed based on the EEOC's understanding that no additional action is required to preserve their claims, district courts following the minority view will summarily dismiss their suits. Thus plaintiffs are currently told that subsequent exhaustion is not required, only to have their claims dismissed by the district courts for failure to exhaust.

At this point, only this Court's guidance can ensure the uniform application of federal law.

C. This Case Squarely Presents the Question to This Court.

This case presents an excellent vehicle for this Court's resolution of this critical legal issue. As established by the record below, Nurriddin alleges both discriminatory and retaliatory non-promotion of an ongoing and continuing nature in the period immediately following his first EEO charge. Unlike *Martinez*, where the Tenth Circuit faced a claim for discriminatory termination occurring almost two years after the administrative charge, Nurriddin's claims present the continuation of the same discriminatory and retaliatory conduct he raised in his EEO charge. On these facts, this Court need not hold that subsequent *discrete* acts do not require separate exhaustion, only that claims based on related, ongoing conduct are exhausted as reasonably arising out of a prior administrative charge. The case thus presents an attractive opportunity for this Court to resolve a narrow question: whether claims that are related to a prior administrative charge are exhausted under Title VII.

The D.C. Circuit's decision to dispose of Nurriddin's appeal through an unpublished affirmance should not deter this Court from issuing a writ of certiorari. Nurriddin fully developed the record in the district court, and the court's resulting decision discussed the exhaustion issue in detail. On appeal, Nurriddin and Amicus below expressly and consistently contested the non-exhaustion of Nurriddin's non-promotion claims and the district court's erroneous application of *Morgan*. Amicus raised the circuit split to the court of appeals in briefs and at

arguments. The D.C. Circuit's affirmance of the district court holding in a cursory, unpublished opinion should not serve to insulate an important question of federal law from this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (holding the traditional "pressed or passed upon" rule for granting certiorari requires that the claim be either "pressed" or "passed," not both).

In short, this case presents an attractive vehicle through which this Court could resolve a critical issue of national importance. The Court should therefore issue a writ of certiorari in the instant case.

III. The Decision Below Misinterprets Title VII's Exhaustion Requirement, Misapplies this Court's Holding in *Morgan*, and Undermines the Purpose of Civil Rights Legislation.

In the face of an irreconcilable circuit split, the decision below took the incorrect route. That decision misunderstands this Court's rule in *Morgan*, relying upon it to require separate administrative exhaustion even when the EEO was on notice to examine post-filing conduct during its investigation. This approach flatly contradicts this Court's precedent, the opinions of the majority of the courts of appeals, and the interpretation espoused by the EEOC. It also undermines the purpose of Title VII, by suggesting that *Morgan* intended to impose duplicative and unreasonable exhaustion requirements upon plaintiffs who have properly sought administrative relief before filing suit in federal court.

A. *Morgan*'s Holding is Limited to Conduct Shielded From Judicial Review by Title VII's Statutory Limitations Period.

The district court dismissed Nurriddin's non-promotion claim as unexhausted, even through the EEO had clear notice of and actually investigated Nurriddin's claims of ongoing discrimination and retaliation. This decision is clearly incorrect. Title VII's administrative filing requirements merely serve to bar stale and outdated claims, not to prevent plaintiffs from pursuing additional claims based on investigated conduct that arises after the timely filing of an administrative charge.

This Court correctly held in *Morgan* that claims relating to discrete discriminatory acts that occurred more than 180 days *prior* to the filling of an EEOC charge cannot be raised in federal court by bootstrapping them to related timely claims. 536 U.S. at 114–115. To permit liability on such time-barred acts would frustrate the fact-finding and reconciliatory purposes of administrative exhaustion. *Id.* at 121. *Morgan* thus reinforces this Court's longstanding recognition that administrative exhaustion serves to ensure timely notice of grievances for effective fact-finding, facilitate the amelioration process, and thereby reduce litigation. *Id.*; *see also Ledbetter*, 127 S. Ct. at 2170–2171; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982). But where those objectives are otherwise met, additional procedural roadblocks to federal court serve no legitimate purpose. *See, e.g., Bowen v. City of New York*, 476 U.S. 467 (1980) (waiving exhaustion

requirement where additional fact-finding would not have aided analysis of the claim); *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324 (1969) (waiving exhaustion requirement where repeated complaints made additional exhaustion futile).

Thus, both the Sixth and Eighth Circuits understand that *Morgan* does not apply to post-filing conduct because the EEOC has notice of and the opportunity to investigate such subsequent conduct. As the Sixth Circuit explained, notice serves as the touchstone of any exhaustion analysis:

> Given that that administrative exhaustion requirement's purpose is, at least in part, to put potential defendants on notice while giving the EEOC the opportunity to investtigate and, if possible, to mediate claims, in this situation the EEOC would have already had the opportunity to investigate, making a second filing unnecessary.

Delisle, 94 F. App'x at 254. The Eighth Circuit reached the same conclusion, finding subsequent conduct exhausted where a reasonable EEOC investigation "would certainly have focused on whether or not the retaliation alleged was in fact existent at the time of the filing of the charges and if it did indeed continue to exist at the time of the investigation." *Wedow*, 442 F.3d at 674.

Under the facts of this case, the EEO had ample notice to investigate Nurriddin's claims of discriminatory and retaliatory non-promotion. In his 1995 charge, Nurriddin alleged that "he has not been

promoted since he began work in the Education Division although other White Employees have received promotions." App. 67–71. At minimum, this statement put the EEO on notice that Nurriddin's non-promotion continued as of the administrative charge filing date in February 1995. And, as the Eighth Circuit observed in *Wedow*, the EEO would necessarily have known, in the course of its subsequent investigation, that Nurriddin still was not promoted through 1995 and 1996. *See Wedow*, 442 F.3d at 674. Considering that the EEO further investigated the same conduct pursuant to Nurriddin's 1997 charge, and did not reach its final decision regarding either charge until September 1999, it defies logic to claim that the EEO lacked notice or an opportunity to investigate conduct that occurred during the span of its investigation. Nevertheless, the district court found Nurriddin's non-promotion claims unexhausted based on a misapplication of this Court's holding in *Morgan*.

The court below, like a series of other courts, seriously misapplied this Court's holding in *Morgan*, and thereby dismissed properly filed Title VII claims. This Court should grant this petition and clarify its holding in *Morgan*.

B. Title VII's Administrative Exhaustion Requirement Does Not Impose Such Unreasonable Barriers On Civil Rights Plaintiffs.

The effect of the holding below is that employees alleging ongoing discriminatory conduct must repeatedly amend or renew their administrative

charges, each time re-alleging the same conduct, in order to preserve their right to judicial review. This outcome undermines Title VII in two important ways. First, it places an unnecessary and ridiculous administrative burden on plaintiffs. Second, it asks an employee who is retaliated against for Title VII activity to re-engage in that same activity without satisfactory protection.

In this case, the courts below would have required Nurriddin, as a federal agency employee,[9] to amend his administrative complaint every forty-five days in order to preserve his claim. Because his charges spanned a period of nearly three years, this would have required Nurriddin to file twenty-five amendments re-alleging the exact same discriminatory and retaliatory conduct, even though the EEO was already actively investigating Nurriddin's ongoing complaints. This is precisely the sort of wasteful and duplicative administrative hurdle that courts have consistently refused to impose upon Title VII complainants. *See, e.g.*, *Jasch v. Potter*, 302 F.3d 1092, 1096 (9th Cir. 2002) (holding Title VII exhaustion requirements were "not meant to erect a massive procedural roadblock to access to the courts.") (internal quotation omitted); *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) ("Title VII['s] exhaustion requirements . . . are

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[9] Federal agency employees are subject to an additional regulation requiring that they contact an EEO Counselor within forty-five days of the alleged discriminatory conduct prior to filing an administrative charge. 29 C.F.R. § 1614.105(a)(1).

practical and pragmatic and should not be invoked when they serve no practical purpose.") (internal quotation omitted).

Requiring new or amended charges in the context of retaliatory conduct is particularly unreasonable, as it asks an employee to re-engage in conduct for which she has already been punished. As the Second Circuit explained, such a requirement:

> would have the perverse result of rewarding the most egregious forms of retaliation. The more effective an employer was at using retaliatory means to scare an employee into not filing future complaints, the less likely the employee would be able to hold the employer liable for that retaliation.

Terry, 336 F.3d at 151. Title VII's exhaustion requirement was not designed to create an incentive for employers to retaliate against employees in order to shield themselves from liability.

Five years have passed since this Court's decision in *Morgan*. Since that time, the courts of appeals have split on a question of national importance: whether a Title VII plaintiff must file a separate EEOC charge for unlawful conduct that is related to but occurs *after* the initial charge. The lower court misapplied *Morgan*, adopted the view of the minority of circuits and, in doing so, applied a rule of procedure that thwarts the very purpose of Title VII.

Now, in a number of jurisdictions throughout the land, a plaintiff, like Nurriddin, must file an additional charge with the EEO every forty-five days, even though that charge is related to and perhaps even identical to one already filed with the EEO. And, he must file this charge even though the EEOC's own regulations and guidance tell him that no additional charge is necessary. When Congress created Title VII's exhaustion requirement, it never envisioned such a cumbersome, unnecessary, and procedurally complex process to vindicate civil rights. This Court surely did not imagine such a result when it handed down its decision in *Morgan*. To end this complex and unwieldy practice, resolve a deep and enduring split among the circuits, and add coherence and consistency to the enforcement of our nation's civil rights laws, this Court should grant this petition and reverse the decision of the court of appeals.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

PAUL M. THOMPSON
Counsel of Record
KELLY M. FALLS
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner

November 29, 2007

APPENDIX

APPENDIX A
Opinion of the United States Court of Appeals for the District of Columbia Circuit (filed April 16, 2007)

AHMAD B. NURRIDDIN,
APPELLANT

v.

MICHAEL GRIFFIN, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION,
APPELLEE

No. 05-5386

United States Court of Appeals
for the District of Columbia Circuit

222 Fed. Appx. 5
2007 U.S. App. LEXIS 9001

April 16, 2007, Filed

For Admad B. Nurriddin, Plaintiff - Appellant, Pro se, Washington, DC.

For Michael Griffin, Administrator, National Aeronautics and Space Administration, Defendant - Appellee: R. Craig Lawrence, Assistant U.S. Attorney, Michael Joseph Ryan, Assistant U.S. Attorney, Heather Graham-Oliver, Jeffrey Allen

Taylor, U.S. Attorney, U.S. Attorney's Office (USA), Civil Appellate, Washington, DC.

For Steven H. Goldblatt, Amicus Curiae for Appellant: Steven Harris Goldblatt, Richard Harris Frankel, Francisco R. Maderal, Kelly M. Falls, Washington, DC.

Before: SENTELLE, TATEL, and BROWN, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs by the parties and oral arguments of counsel. The court has determined that the issues presented occasion no need for an opinion. *See* D.C. CIR. R. 36(b).

Ahmad Nurriddin appeals the district court's grant of summary judgment in favor of his employer on allegations of discrimination and retaliation in violation of Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000e et seq. Nurriddin claims that his employer, the National Aeronautics and Space Administration ("NASA"), discriminated against him because of his race, religion and sex, and that it retaliated against him after he complained. He claims that, over an approximately six-year period between his hiring and eventual promotion, NASA took a number of actions against him that were motivated by discriminatory and retaliatory animus. The district court, after a thorough review

of the evidence and the applicable legal standards, held that several of the claims were not fully exhausted, and that the others were not supported by evidence sufficient to survive summary judgment. *Nurriddin v. Goldin*, 382 F. Supp. 2d 79, 92-106 (2005). Viewing the matter *de novo*, in light of the record, and the parties' briefs and oral argument, we agree. Nurriddin made an insufficient showing to rebut NASA's legitimate nondiscriminatory reasons for failing to promote him through May 1995. As to the period after May 1995, he failed to allege any discriminatory action. Accordingly, it is

ORDERED and ADJUDGED that the district court's entry of summary judgment for NASA is affirmed.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per curiam

FOR THE COURT:

Mark J. Langer, Clerk

APPENDIX B
Opinion of the United States District Court for the District of Columbia (filed August 17, 2005)

AHMAD B. NURRIDDIN,
PLAINTIFF

v.

DANIEL GOLDIN,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION,
DEFENDANT.

Civil Action No. 99-3401

United States District Court
for the District of Columbia

382 F. Supp. 2d 79
2005 U.S. Dist. LEXIS 17079

August 17, 2005, Decided
August 17, 2005, Filed

For Ahmad B. Nurriddin, Plaintiff: Pro se, Washington, DC.

For Daniel Goldin, in his official capacity as Administrator, National Aeronautics and Space Administration (NASA), Defendant: Heather D. Graham-Oliver, U.S. Attorney's Office, Washington, DC.

JOHN D. BATES, United States District Judge.

MEMORANDUM OPINION

Plaintiff Ahmad Nurriddin, proceeding pro se, brings this employment discrimination action against Daniel Goldin, in his official capacity as administrator of the National Aeronautics and Space Administration ("NASA"), pursuant to Title VII of the Civil Rights Acts of 1964, as amended, *42 U.S.C. § 2000e et seq.*, alleging discrimination based on race, sex and religion, retaliation, and hostile work environment. Presently before the Court are defendant's motion to amend and defendant's motion for summary judgment. For the reasons that follow, the Court will grant both of defendant's motions.

BACKGROUND

The essential facts in this case are not in dispute.[10] Plaintiff was hired by NASA in May 1991

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[10] These facts are drawn from Defendant's Statement of Material Facts as to which There Is No Genuine Issue ("Def.'s Statement"). Plaintiff's response does not dispute defendant's facts, except where noted. See Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue Precluding Entry of Summary Judgment ("Pl.'s Response"). Plaintiff also filed an Page 1 additional Statement of Genuine Issues of Material Facts ("Pl.'s Statement "), which does not respond to Def.'s

as part of a "contractor conversion process" whereby contractors working for NASA were converted to civil servants. See Def.'s Statement PP 1-3. Prior to his conversion, plaintiff worked for the Omega Group, Inc. as a project manager supporting the NASA Educational Affairs Division. Id. P 4. Plaintiff's principal responsibilities, prior to the conversion, and immediately thereafter, included shipping, receiving, warehousing, and general dissemination of NASA educational and informational publications. Id. Upon the conversion, plaintiff became a Publication Specialist at the GS-12 level. Id. P 5. This position did not have promotion potential. Id.

In October 1991, plaintiff orally complained to the Deputy Director of the Educational Affairs Division at NASA, Frank Owens, that Ms. Bacon, a white female, was converted to a civil servant at two grades above him, and indicated that he wanted to be promoted. See PL.'s Statement P 9. Ms. Bacon worked on an Oklahoma State University contract before being converted to a civil servant at the GM-14 level. Id. P 3. After this complaint, and because plaintiff's position had no promotion potential, plaintiff was reassigned to the Elementary and Secondary branch, and took on responsibilities that were more in line with a Program Manager. Id. Plaintiff contends he should have been immediately promoted to GS-13 because he took on significantly more responsibilities, including some duties

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Statement, but instead offers plaintiff's own assessment of the material facts.

previously performed by an employee at GS-13. See Pl.'s Statement P 13. Plaintiff also notes that defendant failed properly to document this transfer in plaintiff's official personnel file in contravention of standard agency human resource policy. Id. P 14. Plaintiff's official title remained Publication Specialist until February 1995, when it was officially changed to Education Outreach Specialist. See Pl.'s Statement P 48.

In December 1992, plaintiff complained to Dr. Robert Brown, Deputy Associate Administrator of the Office of Human Resources, that he had not been promoted yet. See Pl.'s Statement P 20. Thereafter, in February 1993, plaintiffs immediate supervisors, Frank Owens and Dr. Eddie Anderson ("Dr. Anderson"), gave plaintiff responsibility for developing the "Turner Plan." See Pl.'s Response P 11. Plaintiff was told that upon successful completion of the Turner Plan he would be promoted to grade GS-13. Id. There is some dispute between the parties over whether the Turner Plan was successfully completed. Plaintiff argues that he successfully submitted several drafts of the Turner Plan. Id. P 12. According to defendant, plaintiff submitted the final Turner Plan in May 1995. See Def. Reply, Ex. R-3, Affidavit of Franklin C. Owens ("Owens Aff.") P 5. In the interim, defendant contends that plaintiff submitted deficient products. Id. While issues with the Turner Plan were ongoing, plaintiff, in March 1994, met with Associate Administrator for the Office of Human Resources and Education at NASA, General Spence Armstrong ("Gen. Armstrong"), and again

complained about the lack of a promotion, as well as the fact that plaintiff viewed the hiring of Ms. Bacon at two grades above him as discriminatory. See Pl.'s Statement P 29.

Then on July 18, 1994, Dr. Anderson issued plaintiff a letter of reprimand that cited plaintiff's "negative attitude and deliberate refusal to properly follow [Dr. Anderson's] explicit instructions." See Pl. Opp'n, Ex. 68. The letter also cited plaintiff for his failure to complete assignments on time, and his failure to keep his supervisors abreast of his location. Id. In December 1994, plaintiff made his first contact with NASA's Equal Employment Opportunity ("EEO") counselor, complaining of unlawful discrimination and retaliation. See Def. Mem., Ex. 8. Plaintiff's EEO complaint was formally filed on February 9, 1995. Id. The Equal Employment Opportunity Commission ("EEOC") accepted for investigation plaintiff's charges that he was given a letter of reprimand on July 18, 1994 and that he had not received a promotion since the time of his employment at NASA because of discrimination and retaliation. See Def. Mem., Ex. 6. The EEOC rejected consideration of plaintiff's complaint that because of his race he had been hired two grade levels below others. Id. The EEOC determined that the latter allegation was not timely filed. Id.

Besides this EEOC activity in 1995, plaintiff also cites three specific incidents of alleged discrimination by NASA. First, in March of 1995 plaintiff was asked to assist a co-worker who was

having difficulty with an agency-owned computer. See Def.'s Statement P 14. Plaintiff found on the computer folders labeled "racist jokes and stories," "sex bulletin board," "W/american Heritage," and "Jessica Games." See Pl.'s Response P 14. The folders titled "racist jokes and stories" and "sex bulletin board" were empty, and plaintiff's co-worker Dr. Malcolm Phelps, who had possession of the computer, was unaware how the icons got on the computer. Id. Plaintiff subsequently complained to his supervisor, Dr. Anderson, about the icons on the computer and requested an investigation. Id. Plaintiff, however, did not receive documentation that would confirm an investigation was actually conducted. Id.

Second, in October 1995, NASA went through a downsizing and the Education Division, in which plaintiff worked, was reorganized. See Second Am. Compl. P 104. As part of the reorganization, plaintiff was told that if he wished to continue to work in the Elementary and Secondary Education Branch, he would be reassigned to the Goddard Space Flight Center in Greenbelt, Maryland. See Pl.'s Statement P 52. Alternatively, plaintiff could remain at NASA headquarters in Washington, DC, if he accepted reassignment to the Graduate Student Researchers Program. Id. Plaintiff chose to remain at NASA headquarters and his old responsibilities were reassigned to other NASA employees, some of whom were at a higher pay grade than plaintiff. Id. P 53.

Finally, in July and August of 1996 plaintiff requested travel funds to attend the Advancing Minorities in Engineering Conference in Nashville, Tennessee, at which plaintiff was invited to give a presentation. See Pl.'s Statement P 65. However, NASA denied his request in September 1996, citing plaintiff's short notice on the request and the fact that he had already spent his travel allocation. NASA also said plaintiff's travel plans were not "mission critical." See Def. Mem. Ex. 19, Affidavit of Malcolm Phelps ("Phelps Aff.") PP 2-4.

On November 5, 1996, plaintiff again contacted the EEO counselor at NASA, and he filed a second administrative complaint on April 3, 1997. See Def. Mem., Ex. 8. In that complaint, plaintiff alleged that he was subject to a hostile work environment. Id. The specific incidents cited by plaintiff as comprising a hostile work environment were: (1) denial of travel; (2) a 1996 e-mail threatening a reprimand; (3) denial of promotion; (4)oral admonishment for being late to a staff meeting; (5) e-mail admonishment in 1996; and (6)an assistant director interfered with his ability to perform tasks. Id. Plaintiff's 1995 and 1997 administrative complaints were consolidated for investigation. Id. On September 21, 1999, the Final Agency Decision was issued, which found that NASA had not discriminated or retaliated against plaintiff. Id.

LEGAL STANDARDS

I. Motion to Amend

Fed. R. Civ. P. 15(a) governs the amendment of pleadings, and states that leave to file an amended complaint should be "freely given when justice so requires." Whether to grant a motion to amend is within the sound discretion of the district court. *Firestone v. Firestone, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1208 (D.C. Cir. 1996).* However, it is an abuse of that discretion to deny a motion to amend without a "justifying" or sufficient reason. *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).* These reasons include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies . . . undue prejudice to the opposing party futility of amendment, etc." Id. Generally, under *Rule 15(a)* the non-movant bears the burden of persuasion that a motion to amend should be denied. See *Dove v. Washington Metro. Area Transit Auth., 221 F.R.D. 246, 247 (D.D.C. 2004)*; see also *Gudavich v. District of Columbia, 22 Fed. Appx. 17, 18 (D.C. Cir. Dec. 27, 2001)* (noting the non-movant "failed to show prejudice from the district court's action in allowing the motion to amend")

II. Summary Judgment

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." *Fed.R.Civ.P. 56(c).* The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. See *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* The moving party may successfully support its motion by "informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. (quoting *Fed.R.Civ.P. 56(c)*).

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id. at 252.* By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex, 477 U.S. at 322.* "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson, 477 U.S. at 249-50* (internal citations omitted). Summary judgment is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." *Id. at*

252; see also *Holbrook v. Reno, 339 U.S. App. D.C. 4, 196 F.3d 255, 259-60 (D.C. Cir. 1999).*

III. Legal Framework Under Title VII

A plaintiff has the burden of establishing a prima facie case of discrimination or retaliation by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*; *Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).* To establish a prima facie case of discrimination, a plaintiff must demonstrate that (1)he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. *Stella v. Mineta, 350 U.S. App. D.C. 300, 284 F.3d 135, 145 (D.C. Cir. 2002)*; *Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999).* To make out a prima facie claim of retaliation, a plaintiff must establish that (1) he engaged in a statutorily protected activity; (2) the employer took an adverse personnel action; and (3) a causal connection existed between the two. *Brody, 199 F.3d at 452*; *Mitchell v. Baldridge, 759 F.2d 80, 86, 245 U.S. App. D.C. 60 (D.C. Cir. 1985)*; *McKenna v. Weinberger, 234 U.S. App. D.C. 297, 729 F.2d 783, 790 (D.C. Cir. 1984).*

If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas, 411 U.S. at 802.* The employer's burden, however, is merely one of

production. *Burdine, 450 U.S. at 254-55.* The employer "need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id.

If the employer is successful, the burden shifts back to the plaintiff to show that the employer's stated reason was a pretext for discrimination or retaliation. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).* The plaintiff "may attempt to establish that he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence.'" Id. (quoting *Burdine, 450 U.S. at 256*). But "proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." *Id. at 147.* Thus, the trier of fact may also "consider the evidence establishing the plaintiffs prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" Id. (quoting *Burdine, 450 U.S. at 255 n.10*). "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors . . . including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id. at 148-49.* As the D.C. Circuit has explained:

> Assuming then that the employer has met its burden of producing a nondiscriminatory reason for its actions, the focus of proceedings at trial (and at summary judgment) will be on whether the jury could infer discrimination from the combination of (1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment).

Aka v. Washington Hosp. Ctr., 332 U.S. App. D.C. 256, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc); see also *Waterhouse v. District of Columbia, 353 U.S. App. D.C. 205, 298 F.3d 989, 992-993 (D.C. Cir. 2002)*.

Although the "intermediate evidentiary burdens shift back and forth" under the McDonnell-Douglas framework, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves, 530 U.S. at 143* (quoting *Burdine, 450 U.S. at 253*). Once the defendant has proffered a legitimate non-discriminatory reason for its action, then, the

question is whether that proffered reason is a pretext for discrimination, and at this point the McDonnell Douglas shifting burdens framework disappears, the sole remaining issue is discrimination vel non, and "to survive summary judgment the plaintiff must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." *Lathram v. Snow, 357 U.S. App. D.C. 413, 336 F.3d 1085, 1088 (D.C. Cir. 2003)*; see *Reeves, 530 U.S. at 142-43.* Examination of that issue in this setting therefore requires consideration of all the relevant circumstances in evidence, including the strength of the prima facie case, any direct evidence of discrimination, any circumstantial evidence that defendant's proffered explanation is false (which may be enough with the prima facie case to infer unlawful discrimination), and any properly-considered evidence supporting the employer's case. *Reeves, 530 U.S. at 147-48*; see also *Teneyck v. Omni Shoreham Hotel, 361 U.S. App. D.C. 214, 365 F.3d 1139, 1151 (D.C. Cir. 2004)*; *Lathram, 336 F.3d at 1089*; *Waterhouse, 298 F.3d at 993*, *Aka, 156 F.3d at 1290.*

ANALYSIS

Plaintiff's 192-paragraph Second Amended Complaint contains a laundry list of allegedly discriminatory incidents. Plaintiff has packaged some (although not all) of these alleged events into nine separate causes of action. Notwithstanding the length of plaintiffs complaint and the number of counts, he essentially raises three categories of

causes of action in his complaint: discrimination, retaliation, and hostile work environment. Plaintiff's discrimination claims (counts I, II, V & VI) center on allegations of unlawful personnel decisions including a failure of NASA to promote plaintiff. For his retaliation claims (counts III, IV, VII & VIII) plaintiff reclassifies his allegations of discrimination as claims of retaliation. Finally, plaintiff includes a list of alleged incidents that he contends amounts to a hostile work environment. Defendant argues that summary judgment should be granted because plaintiff has failed to exhaust his administrative remedies on some claims, failed to state a prima facie claim, and failed to overcome defendant's legitimate, non-discriminatory justification for the complained of employment actions. In support of its exhaustion argument, defendant also moves for leave to amend its answer to include the affirmative defense. The Court will first address defendant's motion to amend, and then turn to defendant's motion for summary judgment.

I. Motion to Amend

Because defendant failed to raise the affirmative defense of exhaustion in its answer, it has now moved for leave to amend the answer to include this defense. See Def. Mot. to Amend at 3. Without this amendment, defendant could not assert the exhaustion arguments contained in its motion for summary judgment. See *Harris v. United States Dep't of Veterans Affairs, 326 U.S. App. D.C. 362, 126 F.3d 339, 344 (D.C. Cir. 1997)* (noting that unlike in some circuits, in the D.C.

Circuit an affirmative defense cannot be raised for the first time in dispositive motions, but must be raised in responsive pleadings). Plaintiff vigorously challenges defendant's motion to amend, arguing that defendant's failure to raise exhaustion in its answer has waived this defense.

Generally, an affirmative defense, such as failure to exhaust, must be raised in responsive pleadings. See *Harris, 126 F.3d at 343.* However, the court in Harris also noted that *Fed. R. Civ. P. 15* should be used to permit amendment of pleading under appropriate circumstances. *Id. at 343-44.* Under *Rule 15*, an amendment is generally permitted unless there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies . . . undue prejudice to the opposing party . . . futility of amendment, etc." *Foman, 371 U.S. at 182.* Because amendment is to be liberally granted, the non-movant bears the burden of showing why amendment should not be allowed. See, *Dove, 221 F.R.D. at 247.*

In this case, plaintiff notes that when defendant challenged his motion to file a Second Amended Complaint, defendant argued that the complaint "sets forth substantially the same factual premise for each count" as did the Amended Complaint. See Pl. Opp'n to Mot. to Amend at 1. Plaintiff also contends that he is prejudiced by having to respond to defendant's motion for summary judgment and motion to amend. Id. at 3. Finally, plaintiff argues that defendant's motion should be denied as untimely given the length of time that has passed

(eleven months) between the filing of his Second Amended Complaint and the motion to amend. Id. at 2.

The key issue in considering a motion to amend is whether the non-movant will suffer any prejudice from the amendment. Plaintiff has not established how he would be prejudiced by permitting this amendment, other than having to respond to the defense, nor can the Court envision a basis for prejudice. Although eleven months passed between defendant's answer and this motion for leave to amend the answer, there is no evidence that the delay was in bad faith. See *Long v. Wilson, 393 F.3d 390, 399 (3rd Cir. 2004)* (14-month delay in raising status of limitations defense not prejudicial where no evidence of bad faith); *Block v. First Blood Associates, 988 F.2d 344, 351 (2d Cir. 1993)* (court permitted statute of limitations defense raised for first time four years after complaint filed because no bad faith, and untimeliness of suit not affected by passage of time). Furthermore, the inclusion of the exhaustion defense does not necessitate additional discovery, as the only relevant fact is whether plaintiff raised the claims in his administrative action. The affirmative defense of exhaustion is principally a question of the legal significance of plaintiff's failure to exhaust. Hence, there is no issue of lost evidence. This amendment also would not preclude plaintiff from raising any arguments or defenses or taking other steps to negate this affirmative defense. See *Block, 988 F.2d at 350* (permitting late affirmative defense where plaintiff's response to the defense was not affected

by the delay in raising the defense). Defendant has briefed the defense in its motion for summary judgment, and plaintiff has responded to those arguments. Therefore, the Court will grant defendant's motion for leave to amend and permit defendant to amend its answer to include the affirmative defense of failure to exhaust.

II. Motion for Summary Judgment

A. Failure to Exhaust

Defendant argues that the following claims in plaintiff's Second Amended Complaint were never presented to the EEOC and therefore plaintiff cannot pursue them here 2 (1) being given a choice to accept new assignments or face being sent to a new office, Compl. PP 106-107; (2) being assigned responsibilities that were previously conducted by a GS-14, Compl. P 111; (3) not being promoted from September 1994 to December 1996, Compl. P 149; (4)receiving a lowered performance rating for the period of October 1993 to July 1994, Compl. P 56; and (5) being hired two grade levels below other white employees, Compl. P 76. See Def. Mem. at 8-9. Plaintiff responds that defendant's actions indicate a pattern of discrimination, and therefore defendant's exhaustion argument should be rejected. Pl. Opp'n at 7. Plaintiff's sur-reply to defendant's motion for leave to amend the answer

also argues that plaintiff is not required to exhaust on retaliation claims. See Pl. Sur-reply at 3.[11]

It is well-established that a federal employee may assert a Title VII claim in federal court only after a timely complaint has been presented to the agency involved. See *29 C.F.R. § 1614.105(a)*; *Brown v. GSA, 425 U.S. 820, 832, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976).* The purpose of the administrative exhaustion requirement is to ensure that an agency has notice of a claim and an opportunity to rectify the employee's complaint. See *Brown v. Marsh, 250 U.S. App. D.C. 8, 777 F.2d 8, 14 (D.C. Cir. 1985).* Accordingly, a plaintiff must bring an administrative complaint to an EEO counselor within 45 days of the alleged incident, or risk losing the right to bring that claim before a federal court. See *Siegel v. Kreps, 654 F.2d 773, 776-77, 210 U.S. App. D.C. 58 (D.C. Cir. 1981)*; *29 C.F.R. § 1614.105(a)(1).* This administrative exhaustion requirement applies to all discrete acts of discrimination or retaliation. See *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002).*

In the instant case, there is no evidence that plaintiff brought any of the above allegations before

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[11] Defendant's exhaustion argument applies in so far as these claims are asserted as a cause of action for unlawful discrimination or retaliation. See Def. Mem. at 8-10. NASA does not argue that these claims are barred as part of plaintiff's hostile work environment claim. Id.

the EEOC. See Def. Mem., Ex. 6. Nor does plaintiff contest the fact that these claims were not presented to or accepted for investigation by the EEOC. See Pl. Opp'n at 7. Instead, plaintiff argues that defendant's exhaustion argument should be rejected because defendant has exhibited a pattern of discrimination which eliminates the necessity for exhausting each and every claim. Id. Plaintiff also appears to argue that these claims grow out of the earlier EEOC allegations, which may eliminate the necessity for exhaustion. Id. However, the Supreme Court in Morgan rejected plaintiff's pattern and practice argument for discrete acts of discrimination or retaliation that had not been separately exhausted but were "sufficiently related" to a properly exhausted claim. See *Morgan, 536 U.S. at 105.* The Court emphasized in Morgan that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law," *id. at 108* (citing *Mohasco Corp. v. Silver, 447 U.S. 807, 826, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980))*, and that recovery was precluded "for discrete acts of discrimination or retaliation that occur outside the statutory time period," *id. at 105.* Recently, the District of Columbia Circuit held that although on its facts Morgan bars recovery for discrete acts occurring before the statutory time period, Morgan has been understood also to bar recovery for discrete acts occurring after the filing of an administrative complaint, when a plaintiff does not file a new complaint or amend the old complaint but instead presents these acts for the first time in federal court. See *Martinez v. Potter, 347 F.3d 1208, 1210-*

11 (D.C. Cir. 2003); *Velikonja v. Mueller, 315 F.Supp.2d 66, 74 (D.D.C. 2004).*

Applying *Morgan*, then, there is ample evidence in the record to conclude that plaintiff did not administratively exhaust his remedies on the five claims cited above. In particular, the EEOC explicitly stated that plaintiff's claim that he was hired two grade levels below similarly situated white employees was not brought before the EEOC within the statutorily mandated time. See Def. Mem., Ex. 8. As to the other four claims, examining the Final Agency Decision, there is no evidence that plaintiff raised any of them. As such, to the extent that these allegations are claims of discrete discrimination or retaliation, they are barred for a failure to exhaust administrative remedies.

B. Discrimination

With respect to plaintiff's remaining claims, defendant contends that there are no genuine material facts in dispute on plaintiff's discrimination claims, and that plaintiff has failed to establish a prima facie case or that defendant offered a legitimate nondiscriminatory reason for the challenged action. The Second Amended Complaint contains four counts of alleged discrimination based on race, sex, and religion: unlawful discrimination in disciplinary action (count I); unlawful discrimination in denied promotion (count II); unlawful discrimination in personnel actions (count V); and unlawful discrimination in denied promotion (count VI). See

Second Am. Compl. PP 67-79, 142-156. Each individual count contains a number of specific allegations. Examining those allegations seriatim, the Court concludes that there are no material facts in dispute, and that plaintiff has either failed to establish a prima facie case or has failed to refute defendant's proffered legitimate nondiscriminatory justification for the questioned employment action.

1. Discrimination in Disciplinary Action (Count I).

Plaintiff's first count alleges that NASA unlawfully discriminated against him when it issued him a letter of reprimand on July 18, 1994. See Second Am. Compl. PP 67-71. Where there is no direct evidence of discrimination, as in this case,[12] the McDonnell-Douglas burden shifting

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[12] Plaintiff seems to contend that there is direct evidence of discrimination, so that the McDonnell-Douglas framework does not apply. See Pl. Opp'n at 8-9. As direct evidence of discrimination, plaintiff points to Dr. Anderson's statement that: "I am aware that Mr. Nurriddin raised the issue of disparate treatment with Gen. Armstrong. I believe sometime in 1994. The reason Frank Owens was upset was that Mr. Nurriddin had an issue that he did not attempt to discuss with his supervisors within the Division before going to see Gen. Armstrong." Id. Although defendant acknowledges that Dr. Anderson made that statement, it is not direct evidence of discrimination, nor does it amount to an admission of discrimination, as plaintiff would argue. Therefore, the Court will assess plaintiff's

framework requires that a plaintiff establish a prima facie case of discrimination by showing that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. See *Stella, 284 F.3d at 145.*

For this claim, NASA does not dispute that it issued the letter of reprimand, but rather argues that plaintiff cannot establish that he suffered an adverse employment action as a result of receiving the reprimand. To establish an adverse employment action, plaintiff must show an action that results in "objectively tangible harm." *Brody, 199 F.3d at 457.* A reprimand that "amounts to a mere scolding, without any disciplinary action which follows, does not rise to the level of adverse action." *Childers v. Slater, 44 F. Supp. 2d 8, 20 (D.D.C.1999)*, vacated in part on other grounds, *197 F.R.D. 185, 191 (D.D.C. 2000)*; see also *Stewart v. Evans, 348 U.S. App. D.C. 382, 275 F.3d 1126, 1136 (D.C. Cir.2002)* ("This Court has held that formal criticisms or reprimands, without any additional disciplinary action such as a change in grade, salary, or other benefits, do not constitute adverse employment actions.").

Here, plaintiff alleges that the letter of reprimand "reduced [his] chances . . . of being promoted in a timely manner and receipt of other favorable personnel actions, with accompanying loss

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claims under the McDonnell-Douglas burden-shifting framework.

of wages and associated benefits." See Second Am. Compl. P 69. However, plaintiff does not provide evidence of any "tangible harm" that he suffered from the letter of reprimand, and his statement to the contrary is pure speculation. Instead, he argues that the letter was improperly issued, citing to numerous documents in the record that he contends show NASA should not have issued him the reprimand. See Pl. Opp'n at 37-38. But plaintiff's evidence regarding the appropriateness of the letter of reprimand does not negate his burden of establishing that he suffered a tangible harm to his employment at NASA from that letter. Plaintiff has not established that he suffered a reduction in benefits, hours of work or salary, or that he suffered significantly diminished work responsibilities, all of which would show plaintiff suffered an adverse employment action. See *Baloch v. Norton, 355 F. Supp. 2d 246, 256-57 (D.D.C. 2005)* (discussing ways in which a plaintiff could establish an adverse employment action). Furthermore, the allegation that the letter may affect future promotions is too speculative to be material. See *Broderick v. Donaldson, 338 F. Supp. 2d 30, 42 (D.D.C. 2004)* (fact that letter of reprimand may have affected supervisor's opinion of plaintiff and in turn affected her chances for promotion too indirect to be adverse employment action). Drawing all inferences in avor of plaintiff, the Court concludes that there is no material fact in dispute on this issue. The record establishes that plaintiff did not suffer any tangible adverse employment action from the issuance of the letter of reprimand and thus cannot establish a prima facie case of discrimination on this claim.

Even were plaintiff able to establish a prima facie case, defendant has also offered a legitimate nondiscriminatory reason for issuing plaintiff the letter of reprimand. Defendant notes that Dr. Anderson, an African-American and plaintiff's supervisor, issued the formal letter of reprimand after providing plaintiff with a warning regarding assignments that needed to be completed. See Pl. Opp'n, Ex. 68, July 18, 1994 Letter of Reprimand. NASA informed plaintiff that he could not go on leave until after his assignments were completed, and although plaintiff failed to complete those assignments, he still took his leave. Id. Plaintiff challenges many of the factual allegations contained in the letter of reprimand, arguing that his assignments were complete, and that his leave was approved. See Pl. Opp'n, Ex. 69, August 10, 1994 Plaintiff Response to Letter of Reprimand. However, while those may be facts in dispute, and plaintiff may question the accuracy of defendant's judgment in issuing him the letter, these facts are not material for purposes of determining whether defendant's proffered justification is a pretext for discrimination. See *E.E.O.C. v. Flasher Co., 986 F.2d 1312, 1322 (10th Cir. 1992)* (Title VII does not hold employer liable for erroneous judgment, unless that judgment was motivated by illegal discrimination). Furthermore, this Court should not become a supervisor of the minutiae of employer's personnel decisions, determining whether or not a particular assignment was completed on time. See *Barbour v. Browner, 337 U.S. App. D.C. 50, 181 F.3d 1342, 1346 (D.C. Cir.*

1999) ("Title VII. does not authorize a federal court to become a super personnel department that reexamines an entity's business decisions'").

Beyond challenging the factual justification of the letter, plaintiff makes unsubstantiated allegations that racism played a role in the issuance of the letter of reprimand, but does not provide any actual evidence of discrimination. In particular, plaintiff contends that Dr. Anderson's comment in the letter of reprimand that plaintiff had a "negative attitude" was a "code term for Upitiy [sic] Negro' who does not know his place." Pl. Opp'n at 35. However, this assertion is based solely on plaintiff's own speculation. Without evidence, the Court cannot validate plaintiff's unsubstantiated allegations that racism played a part in the issuance of the letter. See *Broderick, 338 F. Supp. 2d at 45* (plaintiff's unsubstantiated allegations of racism regarding the reason for a letter of reprimand insufficient to establish that the letter was pretextual). Rather, this Court must determine whether the record contains facts that could show defendant's proffered justification was a pretext for unlawful discrimination. On this point, there is no evidence in the record to indicate that defendant's justification for issuing the letter of reprimand was pretextual. Therefore, even if plaintiff were able to establish a prima facie case on this claim (which he has not done), plaintiff has failed to show defendant's legitimate nondiscriminatory justification for its action was pretext for illegal discrimination.

2. Unlawful Discrimination in Denial of Promotion (Count II)

Plaintiffs second count alleges that he was unlawfully denied promotions from grade GS-12 to GS-13 and -- 14 during the period from October 1991 to September 1994. This claim is different from a typical failure to promote claim because plaintiff did not seek promotion to a vacant position, but rather argues that he should have been promoted during that period because of his level of duties and responsibilities. To establish a prima facie case for this type of failure to promote claim plaintiff must establish that: he is a member of a protected class; he sought a promotion for which he was qualified; he was denied that promotion; and "other employees of similar qualifications . . . were indeed promoted at the time the plaintiff's request for promotion was denied." *Bundy v. Jackson, 205 U.S. App. D.C. 444, 641 F.2d 934, 951 (D.C. Cir. 1981)*; *Taylor v. Small, 358 U.S. App. D.C. 439, 350 F.3d 1286, 1294 (D.C. Cir. 2003)*; *Duckett v. Martinez, 2005 U.S. Dist. LEXIS 2053, 2005 WL 327113, *4 (D.D.C. 2005).*

There is no doubt that plaintiff is a member of a protected class. He also requested a grade promotion on at least three separate occasions: (1) in October 1991 after his conversion; (2) in December 1992 after his transfer to the Educational Division; and (3) in March 1994 not long after the promotions of Ms. McGee and Ms. Galloway. The only questions then are whether plaintiff can establish that he was qualified for a promotion

during the period in question, and whether other employees with similar qualifications received promotions.

a. Qualifications For Promotion

To establish that he was indeed qualified for promotion, plaintiff provides his own assessment of his qualifications, duties, and responsibilities, as well as a discussion of why he was qualified for a promotion. He includes an extensive list of his responsibilities (presumably as of October 1991), but fails to cite to the record to support this list. See Pl. Opp'n at 17-19. Of course, plaintiff's personal subjective assessment of his own qualifications does not carry much weight. See *Schamann v. O'Keefe, 314 F. Supp. 2d 515, 525 (D. Md. 2004).* Plaintiff can also point to his performance appraisals. In 1992 and 1993 he was rated "highly successful," see Pl. Opp'n, Ex.'s 112 and 113, but in 1994 his rating was reduced to "fully successful," see id. Ex. 114.

In response to these arguments, defendant contends that plaintiff was in fact not qualified for a promotion during the period 1991 to 1994. Defendant begins by generally noting that plaintiff could only receive a promotion through an accretion of duties, and during the relevant time period plaintiff never qualified for a promotion. See Def. Reply at 4. In particular, defendant contends that in May 1991, when plaintiff was hired by NASA, his position as publication specialist did not have any promotion potential. See Def.'s Statement P 6.

Then, in October 1991, plaintiff was laterally reassigned to the Elementary and Secondary Branch, which provided plaintiff with an opportunity for promotion. See Def. Reply, Ex. 1, McGee Dec. P 8. According to NASA, plaintiff did not have an education degree or extensive experience in the field of education, unlike others in the Education division. Id. P 7. Hence, plaintiff was given fewer responsibilities, including only one long term project, which was commensurate with an employee at the GS-12 level. Id. P 8. In addition, defendant notes that plaintiff was not eligible for an immediate promotion upon joining the education division because he had to be trained to handle the new position. Id. P 12. According to defendant, the responsibilities and duties outlined in plaintiff's performance review for the period 1991 to 1992 were commensurate with plaintiff's GS-12 level, and defendant notes that plaintiff was only managing one long term project. Id. P 8. Over time, the expectation was that plaintiff would have been promoted through an accretion of duties. Id. The consensus among plaintiff's supervisors is that during the relevant time period, he was performing work at the GS-12 level, and that his level of responsibilities did not warrant a promotion. Thus, the Court finds that plaintiff's own assertion of his qualifications is insufficient to raise a genuine issue of material fact as to whether he qualified for an accretion promotion to GS-13.

b. Circumstances Giving Rise to Discrimination

Even were plaintiff able to establish that he was qualified for a promotion through accretion, he has not shown that similarly qualified co-workers were promoted during the time period. Although plaintiffs Complaint contains a number of counts, the crux of his problem with NASA is plaintiff's believe that similarly qualified, or even less qualified employees were promoted to GS-13 and GS-14, while plaintiff remained at GS-12. To be similarly situated, plaintiff must establish that his employment situation was similar in all relevant regards to those with whom he seeks comparison. See *Phillips v. Holladay Prop. Servs., 937 F. Supp. 32, 37 (D.D.C. 1996)*, aff'd, *1997 U.S. App. LEXIS 19033 (D.C. Cir. June 19, 1997)* ("it is fundamental that to make a comparison of a discrimination plaintiffs treatment to that of non-minority employees, the plaintiff must show that the comparables' are similarly-situated in all respects") (emphasis in original); see also *Holbrook v. Reno, 339 U.S. App. D.C. 4, 196 F.3d 255, 261 (D.C. Cir. 1999)* ("A plaintiff . . . must demonstrate that all of the relevant aspects of [his] employment situation were nearly identical to those" of his comparables.).

Plaintiff points to two separate occasions on which he argues similarly qualified NASA employees were promoted to GS-13 or GS-14, while he remained GS-12. First, in May 1991, during the contractor conversation, plaintiff contends that Ms. Bacon, a white female contractor on the Oklahoma State University contract, was converted at the GS-

14 level. See Pl.'s Statement P 3. He contends that he had a better educational background than Ms. Bacon (a masters in public administration versus a bachelors in education), and therefore should have been at least at the same grade level. Id.; Pl. Opp'n, Ex. 16.[13] Besides the conversion, plaintiff alleges that in 1993, Deborah Galloway and Sherri McGee, both white females similarly situated to him, received promotions to the GS-14 level. See Am. Compl. P 50; Pl. Opp'n at 22-25; Pl.'s Response P 7; Def. Mem., Ex.'s 2 & 3. He includes a chart (for which there is no citation to the record) comparing his duties and responsibilities with those of Ms. Galloway, but provides no similar comparison to Ms. McGee. See Pl. Opp'n at 25.

Defendant vigorously challenges plaintiff's comparisons. First, with respect to Ms. Bacon at the time of conversion, defendant contends that plaintiff did not have the requisite educational background usually required of Education Division employees, and therefore was brought in at a level commensurate with his limited experience and education in the field. See Def. Reply, Ex. 1, Declaration of Sherri McGee ("McGee Dec.") P 8. On the comparison with Ms. McGee and Ms. Galloway, defendant notes that plaintiff and Ms. McGee did not even work in the same branch. Ms.

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[13] Plaintiff also notes that Dr. Julius Dasch, a white male, was converted to a GS-14, but plaintiff does not provide any argument or evidence as to how he would compare to Dr. Dasch. See Pl.'s Statement P 3.

McGee was a Manager in the University Programs Branch, while plaintiff was doing the work of an Education Outreach Specialist in the Elementary and Secondary Branch. See Def. Mem. at 19 and Ex.'s 1 & 2. Furthermore, plaintiff did not have the same supervisor as Ms. McGee. See Pl. Mem, Ex. A. Defendant also points out that while Ms. Galloway and plaintiff both worked in the Elementary and Secondary Branch, they had different positions -- Ms. Galloway was an Educational Services Specialist while plaintiff was an Education Outreach Specialist. See Def. Mem., Ex.'s 3 and 13. Defendant also argues that Ms. Galloway worked as a Program Manager for more years, and managed more complex programs, than plaintiff. See McGee Aff. P 10. She also was managing two programs and was a chairperson for the Division Curriculum Committee, while plaintiff had no comparable management experience, because his duties were principally liaison, support and assistance. Id. Finally, defendant notes that neither Ms. Galloway nor Ms. McGee were hired through the conversion process.

In assessing whether plaintiff is similarly situated with these other employees, the appropriate test is whether a prudent person would objectively think they are roughly equivalent. See *Molloy v. Blanchard, 115 F.3d 86, 91 (1st Cir. 1997)* (quoting *Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989)*), overruled on other grounds in *Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 64 (1st Cir. 2004)*. Examining the entirety of the evidence in the

record, plaintiff has failed to establish that he was similarly situated to any of the other NASA employees that he references. Plaintiff had different background experience, had different responsibilities, and in many cases had a different supervisor. No reasonable jury could conclude that plaintiff was similarly situated with these employees, and thus he cannot establish the final element of a prima facie case for non-promotion.

Although the thrust of plaintiff's prima facie case is a comparison with other NASA employees, and the prima facie test asks whether similarly qualified co-workers were promoted, the D.C. Circuit has made clear that a plaintiff can establish a prima facie case by showing that the unfavorable employment action gives rise to an inference of discrimination. See *Stella, 284 F.3d at 145* (a prima facie claim need not establish that employer hired person from outside protected class). In this regard, plaintiff presents an affidavit from Howard Golden, his first supervisor at NASA, that attributes plaintiff's non-promotion to racism. See Pl. Opp'n, Ex. 146, December 1994 Affidavit of Howard Golden ("Golden Aff."). Mr. Golden states that he believed plaintiff was converted too low given his skills and that plaintiff should have been promoted during the 1991 to 1994 time period. Id. Mr. Golden attributed plaintiffs non-promotion, in part, to race, and believes that plaintiff's second level supervisor (Mr. Owens) was "prejudiced about race." Id.

However, defendant is quick to point out fundamental flaws in Mr. Golden's affidavit that

prevent this evidence from being used to establish a prima facie case. The first problem is the substance of the affidavit. Mr. Golden was plaintiffs supervisor for only a brief period in 1991 before plaintiff was reassigned to the Education Division. See Def. Reply, Ex. 6, June 1995 Affidavit of Howard Golden ("Golden Aff. II") at 2-3. Mr. Golden stated that he believed plaintiff was amply qualified to be converted to a civil servant above GS-12. See Golden Aff. at 1-2. But as stated earlier, plaintiff did not exhaust his administrative remedy for his claim regarding his grade at conversion, and therefore cannot pursue that claim. Most of the substance of Mr. Golden's affidavit regarding plaintiffs non-promotion, then, relates to a claim that is not before the Court.

The second flaw is that the affidavit is not based on personal knowledge regarding the failure to promote plaintiff and is therefore inadmissible hearsay that, by itself, cannot create a genuine issue of material fact. Mr. Golden's statement that plaintiff was not promoted due to race is not based on any personal knowledge regarding plaintiff's promotion prospects from October 1991 to 1994, because Mr. Golden was not plaintiffs supervisor at that time. See Golden Aff. at 1, 2-3. Mr. Golden worked in a different building, did not observe interactions between plaintiff and his immediate supervisor, and spent a year and a half (roughly 1991 to 1993) working at the White House. See Golden Aff. II at 1. Additionally and more importantly, in a second affidavit Mr. Golden stated that he does not have any information or knowledge

as to why plaintiff was not promoted at NASA during that time period. See Golden Aff. II at 8. He was not involved in the promotion decisions regarding plaintiff, id., and his statement that race was the basis of plaintiff's non-promotion is thus pure speculation, not based upon personal knowledge. His speculative assessment of the reasons for plaintiffs non-promotion cannot be used to create a genuine issue of material fact for summary judgment. See *Anderson, 477 U.S. at 252.*

Mr. Golden also stated that he heard Mr. Owens, plaintiff's second level supervisor, once use the word "nigger" to describe an African American at NASA and therefore Owens was "prejudiced about race and religion." This statement is troubling, but it too is insufficient to establish that discrimination played a role in plaintiff's non-promotion. Mr. Golden's testimony as to Mr. Owen's alleged bias is limited to this one racial slur. See *Fed. R. Evid. 602* ("A witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter"). Mr. Owens has specifically denied Mr. Golden's accusation. See Def. Reply, Ex. 6, Affidavit of Frank Owens P. 6. Even if plaintiff could prove to a fact finder that Mr. Owens made the statement, however, it was not made in plaintiff's presence, or about plaintiff. See Golden Aff. at 2. An isolated racial statement, not directed at the plaintiff, not about the plaintiff, and not about the plaintiff's employment situation does not create any inference that discrimination played a role in an adverse employment action. See *Figueroa*

v. Board of Pub. Utils., 967 F.2d 357, 360-61 (10th Cir. 1992) (in a Title VII case, evidence of racial comments is not probative of any issue in the case unless it is linked to relevant personnel actions).

Hence, even if plaintiff could establish that Mr. Owens had racial animus, plaintiff would still have to show some nexus between the racial animus and the employment decision. See *Cone v. Longmont United Hosp. Assoc., 14 F.3d 526, 531 (10th Cir. 1994)* ("isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions"). That he has not done. In fact, Mr. Golden himself states in his second affidavit that he has no information or knowledge as to why plaintiff was not promoted. See Golden Aff. II at 8. An isolated allegedly discriminatory comment, not made in the plaintiff's presence or about plaintiff, does not establish an inference of discrimination.

c. Non Discriminatory Justification

Even if the Court were to assume that plaintiff has established a prima facie case of non-promotion, defendant has offered a legitimate non-discriminatory justification for the failure to promote plaintiff during the relevant time period. Principally, defendant reiterates that plaintiff did not qualify for a promotion through an assessment of duties. Defendant also contends that plaintiff was given explicit directions that he would be promoted once he successfully completed the Turney Project. See Def. Reply Ex. 1: Affidavit of Franklin L.

Owens ("Owens Aff.") at 8-4. According to defendant, upon approval of a formal plan with the Turner School, plaintiff would be promoted to GS-13. Id. Although such explicit offers for promotion were unusual, defendant contends it was done in this circumstance because of plaintiff's previous difficulty in managing work, and his supervisor's sense that concrete goals would be good for him. Id. at 8-5. According to defendant, plaintiff submitted several versions of the Turner Plan that were considered unacceptable, and he did not submit a final Turner Plan during the time period in question. Id. at 8-4; Def. Mem., Ex. 21, Affidavit of Eddie Anderson ("Anderson Aff.") at 17-11. Defendant also notes that plaintiff would have been promoted sooner (he eventually was promoted in 1997) had he completed the Turner Plan consistent with agency standards. See Anderson Aff. at 17-11. Although plaintiff counters that a final copy of the Turner Plan was submitted on May 15, 1995, see Owens Aff. at 4, defendant responds that plaintiff's promotion was contingent upon Mr. Owens' approval of the plan.[3] Id.

d. Pretext for Discrimination

Because defendant has met its burden of production under the *McDonnell Douglas*

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[3] There is no evidence in the record as to whether the Turner Plan was ultimately approved. When plaintiff was promoted in 1997, the Notification of Personnel Action did not contain any justification for the promotion. See Pl. Opp'n, Ex. 37.

framework the burden shifts to plaintiff to produce evidence from which a rational fact-finder could infer that defendant intentionally discriminated against him because of his race or religion. Plaintiff can meet this burden by showing that defendant's justification for non-promotion was a pretext for discrimination. See *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)* (holding that "pretext" means "pretext for discrimination"). Plaintiff must establish "that a reasonable jury could conclude from all the evidence that the adverse employment decision was made for a discriminatory reason." *Lathram, 336 F.3d at 1088.* Resolution of that issue may entail consideration of all relevant evidence including the strength of the prima facie case, any direct evidence of discrimination, circumstantial evidence of the falsity of the proffered explanation, and evidence supporting the employee's case. *See Reeves, 530 U.S. at 147-48; Teneyck, 365 F.3d at 1151; Lathram, 336 F.3d at 1089.*

Plaintiff attacks defendant's proffered justification on several grounds. Besides reiterating his comparative qualifications with his co-workers and Mr. Golden's affidavit, plaintiff also argues that defendant failed properly to document his reassignment in October 1991 to the Elementary and Secondary Branch. See Pl's Statement P 14. HAHA does not contest that plaintiff, although performing work in the Elementary and Secondary Branch, did not have his title officially changed until February 1995, nor does HAHA present any evidence as to why it took so long for the paperwork

to be changed. But as NASA argues, the delay in changing plaintiff's official title had no impact on his non-promotion during that period because even when his title was changed in 1995, it was determined that plaintiff should still be classified as a GS-12. See Def. Reply, Ex. 8, Declaration of Alana Hogan P 2 (when plaintiff's position description was reviewed by human resources it was determined he was appropriately classified GS-12). Plaintiff does not present any evidence, beyond his mere speculation, that the delay in changing his title delayed his promotion. See *Greene v. Dalton, 164 F.3d 671, 675, 334 U.S. App. D.C. 92 (D.C. Cir. 1999)* (plaintiff's unsupported allegation that she was more qualified insufficient to defeat summary judgment). Regardless of the cause of the delay in changing plaintiffs official title, the uncontradicted evidence shows that the delay did not impact his non-promotion.

Plaintiff also references the numerous letters of commendation that he received, see Pl. Opp'n Ex.'s 51-53, 55, and his positive performance reviews, see Id., Ex.'s 111-112. However, these letters and ratings do not tend to show that defendant's stated reason was a pretext for discrimination. This evidence has nothing to do with any possible discrimination by defendant. Defendant was clear in its proffered reason for not promoting plaintiff: he had failed to secure the necessary responsibilities to receive a promotion. See McGee Dec. P 12. Accretion of duties can only be accomplished by an individual raising the level of his duties, not simply by performing commendable

work. See Def. Reply, Ex. 8, Declaration of Alana R. Hogan PP 3-5. Therefore, the fact that plaintiff may have received letters of commendation or positive ratings is besides the point. See *Ezold v. Wolf, Block, Schorr, and Solis-Cohen, 983 F.2d 509, 528 (3rd Cir. 1992)* ("Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories, or has, in the past, received some good evaluations.").

In assessing whether plaintiff has shown that defendant's stated justification is a pretext for discrimination, the Court is guided by "the strength of the prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case." See *Reeves, 530 U.S. at 147-48*. In weighing these factors on a motion for summary judgment, all inferences are drawn in favor of plaintiff. However, defendant's evidence that plaintiff was not promoted because he lacked the job performance and accretion of duties necessary to justify an upgrade was not challenged by the evidence in the record offered by plaintiff. Where there is no evidence that illegal discrimination played a role in an employer's non-promotion, the Court will not sit as a "super personnel department that reexamines an entity's business decisions." *Fischbach v. D.C. Dep't of Corrections, 318 U.S. App. D.C. 166, 86 F.3d 1180, 1183 (D.C. Cir. 1996)* (internal quotations omitted). Hence, defendant is entitled to judgment as a matter of law because there are no material facts in dispute that would undermine his

pretextual) defendant's non-discriminatory justification for plaintiffs non-promotion.

3. Unlawful Discrimination in Personnel Actions (Count V)

Plaintiff's third claim of discrimination is based on two specific allegations. He contends that when NASA refused to fund his travel to a Conference of Engineering Deans of Historically Black Colleges and Universities in September 1996 it did so because of discrimination. See Second Am. Comp. P 143. He also asserts that he was issued an "ultimatum" either to be reassigned to a Maryland office or to accept a change in responsibilities if he wished to remain at NASA headquarters. Id. P 144. As discussed above, however, this second allegation regarding an ultimatum was never properly put to the EEOC, and therefore plaintiff may not proceed on that claim here. With respect to plaintiff's allegation of denied travel, NASA contends that plaintiff was denied permission to travel because he had already exhausted his travel funds, and the travel was not considered mission critical. See Def. Mem., Ex. 19, Affidavit of Malcom Phelps ("Phelps Aff.") at 8-1. Similarly, NASA argues that other employees who were permitted to travel with NASA funding had legitimate justifications for the travel, including mission critical activity. Id. at 8-1, 8-2.

Regardless of the justifications put forth by defendant for denying plaintiff's travel request, the Court returns again to the necessary threshold

element for any Title VII discrimination claim -- an adverse employment action. It is not enough for plaintiff to say that because of the denial of travel his general stature at NASA has suffered. See *Lu v. Billington, 2005 U.S. Dist. LEXIS 5010, 2005 WL 670771, *6 (D.D.C. Mar. 22, 2005)* (limited travel opportunities not an adverse employment action). Plaintiff must tie the alleged discriminatory employment action to some actual, tangible adverse employment consequence. See *Brody, 199 F.3d at 457* (plaintiff must establish "some other materially adverse consequence affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm"). Plaintiff cannot do that here. The record is silent as to how the denial of travel may have caused plaintiff any tangible harm. See *Murray v. Chicago Transit Auth., 252 F.3d 880, 888 (7th Cir. 2001)* (denial of travel to a conference not a "tangible employment action"). Indeed, plaintiff does not even address this issue. Instead, he focuses on the fact that others were permitted to travel while he was not. See Pl. Opp'n at 43-46. But even taking all inferences in plaintiff's favor, no reasonable jury could find that plaintiff suffered an adverse employment action as a result of being denied travel to a conference in 1998. Hence, plaintiff cannot establish a prima facie case of discrimination on this claim.

4. Unlawful Discrimination in Denial of Promotion (Count VI)

Plaintiff's final allegation of discrimination nominally pertains to a promotion denial during the period 1994 to 1996, see Second Am. Compl. P 149, but actually includes a laundry list of incidents of alleged discrimination. Beyond the failure to promote, plaintiff also alleges that he was assigned duties previously done by GS-13 or GS-14 employees, and that some of his duties were reassigned to individuals at the GS-13 or GS-14 level, id. PP 150-152; that he was denied travel to a conference in 1996, id. P 153; and that Ms. McGee interfered with his management of one of his duties, id. P 154. Plaintiff's allegations regarding a failure to promote during the period 1994 to 1996, as well as the allegation that he received responsibilities previously assigned to employees at a higher pay grade, were not properly presented to the EEOC, as discussed above, and plaintiff cannot now pursue those claims in light of his failure to exhaust administrative remedies. See *Marsh*, 777 F.2d at 14. Plaintiff's allegation regarding the denial of travel to a 1996 conference was also previously addressed. Hence, the only remaining claims properly within count VI are plaintiff's allegations that a co-worker (Ms. McGee) interfered with his work in 1996 and that at the time of the reorganization some of his duties and responsibilities were given to employees at a higher grade level.

Ms. McGee was the assistant Director of the Education Division, but she had previously managed the National Physical Science Consortium Training Grant Program (NPSC). See Def. Mem., Ex. F, Affidavit of Sherri McGee ("McGee Aff.") at 2. As manager of NPSC, a fairly small program, her job was to be responsible for day-to-day operations, handle people in the programs, and deal with the budget. See Def. Mem., Ex. 15, Sherri McGee Deposition at 46. Ms. McGee found this program difficult to manage given the personalities of those involved. See McGee Aff. at 2. Eventually, plaintiff took over the responsibility for NPSC. However, Ms. McGee would sometimes get a call from people at NPSC asking her a question when plaintiff was unavailable. Id. Ms. McGee would respond, but tell them to talk to plaintiff, and she would inform plaintiff of the call. Id. In December 1996, a dispute arose over the awarding of grants in NPSC. Id. at 2-3. During the course of this dispute, Ms. McGee offered to set up a conference call to address the issues. Id. at 3. In her new role, it was not unusual for Ms. McGee to become involved in a variety of programs that were having problems, including those like NPSC that she was not directly supervising. Id. As a result of Ms. McGee's involvement, Barbara Caplan, the grant officer, became concerned about who was monitoring the program. See Pl. Opps., Ex. 101.

Plaintiff is essentially claiming that Ms. McGee interfered with his job responsibilities. See Pl. Opps., Ex. 116. However, not only is this claim not leveled against NASA or any supervisor of plaintiff,

see *Jones v. District of Columbia, 346 F. Supp. 2d 25, 44 (D.D.C. 2004)* (noting the distinction between harassment by a co-worker and by a supervisor), but plaintiff has not established a prima facie case. He has not pointed to any evidence in the record from which a reasonable juror could find that plaintiff suffered an adverse employment action as a result of Ms. McGee's involvement in this isolated issue. See *Freedman v. MCI Telecommunications Corp., 347 U.S. App. D.C. 112, 255 F.3d 840, 847 (D.C. Cir. 2002)* (denial to plaintiff of tools, which were only sometimes required, was a minimal job interference that did not rise to the level of adverse employment action). Plaintiff has not shown there were any tangible effects to his employment status as a result of this incident. In fact, the only impact of Ms McGee's "interference" would seem to be the e-mail Ms. McGee, not plaintiff, received from Ms. Cephas, admonishing Ms. McGee, not plaintiff. See Pl. Opp'n, Ex. 107. Plaintiff speculates that Ms. McGee interfered with his program at the behest of Mr. Owens, who sought to embarrass plaintiff. See Pl. Opp'n at 46. However, upon reviewing the e-mail it is not at all evident that plaintiff should have been "embarrassed."

Plaintiff also alleges that during the 1995 reorganization some of his responsibilities and duties were assigned to Deborah Green Glasco,[5] who was at a higher grade level than plaintiff. See

[5] Although Ms. Glasco was an African-American, plaintiff has also alleged discrimination based upon sex (male) and religion (Muslim).

Pl. Opp'n at 43. Plaintiff complains that Ms. Glasco was promoted a year after taking over some of plaintiff's responsibilities, but plaintiff was not similarly promoted. Id. Although plaintiff makes these two general allegations, he does not indicate how he believes these general factual allegations establish a prima facie case. Plaintiff's claim regarding the reassignment of duties does not allege an adverse employment action, and thus plaintiff cannot establish a prima facie case for such a claim. See *Brody, 199 F.3d at 457* ("an employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm").

Plaintiffs claim regarding Ms. Glasco's subsequent promotion in 1996 does theoretically assert an adverse employment action, because plaintiff's failure to be promoted is a tangible harm. However, plaintiff must still establish that discrimination played a role in that adverse action. Here, plaintiff argues that he was similarly situated to Ms. Glasco such that her promotion in 1996 is evidence of discrimination against plaintiff. But plaintiff does not direct the Court to any evidence to show that he and Ms. Glasco were similarly qualified at the time of her promotion or even prior to the reorganization.[16] The record is silent on Ms.

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[16] Plaintiff was promoted just a year later in 1997, see Pl. Opp'n., Ex. 37, which although not

Glasco's specific duties and responsibilities, and plaintiff's arguments on this point do not contain any citations to the record. Moreover, Ms. Glasco and plaintiff had different supervisors at the time of her promotion. See Def. Mem., Ex. 19, Affidavit of Malcolm Phelps ("Phelps Aff.") at 2 ("I supervise Ms. Glasco, but I was not the supervisor for Mr. Nurridin at the time his promotion was denied. His supervisor at that time was Dr. Eddie Anderson"). As discussed earlier, having different supervisors is a factor in determining whether employees are similarly situated. See *Phillips, 937 F. Supp. at 37* (whether employees have same supervisor factor in determining if they are similarly situated). This is especially true when the supervisors are making decisions regarding promotion. See Phelps Aff. at 2.

B. Retaliation

Plaintiff's four retaliation counts mirror his discrimination claims, rehashing the same allegations in retaliation clothing. See Second Am. Compl. PP 80-96, 157-176. Because of that similarity, the four counts of retaliation can be dealt with together.[17] The McDonnell-Douglas framework

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dispositive, does cast doubt on plaintiffs unsupported allegation that discrimination played a role in his 1996 non-promotion.

[17] Allegations of a failure to promote plaintiff during the period of 1994 to 1996, the alleged ultimatum issued to plaintiff, and the reassignment of duties were not administratively exhausted, and therefore as explained above cannot be pursued

applies to retaliation claims, and to state a prima facie claim of retaliation, plaintiff must establish that (1) he engaged in a statutorily protected activity; (2) NASA took an adverse personnel action with respect to him; and (3) a causal connection existed between the two. *Brody, 199 F.3d at 452*; *Mitchell v. Baldridge, 759 F.2d at 86.*

Plaintiff contends that his "complaint of discrimination and prior reprisal to General Armstrong was the but for' cause of his reprimand and denied promotions and travel." Pl. Opp'n at 5. There is no dispute that plaintiff went to Gen. Armstrong in March 1994 to complain about perceived discrimination. See Pl.'s Statement P 29.[18] This clearly constitutes protected activity for purposes of establishing the first element of the prima facie test. See *McGowan v. Billington, 281*

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here as retaliation claims. See *Morgan 536 U.S. at 122* (exhaustion requirement applies to all discrete claims of discrimination and retaliation).

[18] Plaintiff also contends that he complained in December 1992 to Dr. Robert Brown, Deputy Administrator, about discrimination. See Pl.'s Statement P 23. There is some question as to whether plaintiff actually complained of discrimination to Dr. Brown, or whether any of his supervisors were aware of that complaint. See Anderson Aff. at 7-8, However, the specific facts of that alleged protected disclosure are irrelevant because plaintiff's complaint does not allege any retaliation between the time of his contacts with Dr. Brown and with Gen. Armstrong.

F.Supp.2d 238, 245 (D.D.C. 2003) (scope of statutorily protected activity is broad and includes opposition to allegedly discriminatory practices outside the EEOC process). Plaintiff first contacted the EEOC about his discrimination complaints around December 1994, which also constitutes protected activity. See Def. Mem., Ex. 8.

However, plaintiff must show as well that he suffered an adverse employment action. See *Brody, 199 F.3d at 452.* As discussed earlier, as to most of plaintiff's alleged incidents he cannot do so. The letter of reprimand (count III); denial of travel funds for a conference in September 1996 (counts VII and VIII); Ms. McGee's alleged interference with plaintiff's work (count VII); and reassignment of some of his duties to Ms. Glasco in 1995 (count VII) all had no tangible effect on plaintiff's employment, and thus are not adverse employment actions. For purposes of his retaliation claims, then, he has established an adverse employment action for only two allegations: non-promotion during the period 1991 to 1994 (count IV) and non-promotion along with Ms. Glasco in 1996 (count VII).

The final element of a prima facie retaliation case is a causal connection between the protected activity and the adverse personnel action. See *Brody, 199 F. 3d at 452.* Plaintiff has not offered any direct evidence of a connection between his protected activity and the alleged adverse employment actions, and therefore he must rely on circumstantial evidence of the temporal proximity between his complaint of discrimination and his

non-promotions. See *Clark Cty. School Dist. v. Breeden, 532 U.S. 268, 273-74, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001)* ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close.'"). The Supreme Court has cited with approval cases that held that three and four month delays between the protected activity and the adverse action means they were not causally connected. Id.; see also *Brodetski v. Duffey, 199 F.R.D. 14, 20 (D.D.C. 2001)* ("courts generally have accepted time periods of a few days up to a few months and seldom have accepted time lapses outside a year in length").

On plaintiff's claim of failure to promote during the period of 1991 to 1994, plaintiff engaged in protected activity in December 1992. Subsequently, in March and May of 1993, Ms. McGee and Ms. Galloway, respectively, were promoted from GS-13 to GS-14. Thus, the time between plaintiff's activity and these two incidents was three and five months for purposes of establishing a causal connection. Although that time frame is short, in Clark Cty. School Dist. the Supreme Court was clear that the temporal proximity must be "very close" to supply a causal inference. *532 U.S. at 273-74.* A three to five month time period has been considered close enough to establish causation, see *Castle v. Bentsen, 867 F.Supp. 1, 3 (D.D.C. 1994)* (three to five months between protected activity and termination

sufficient to establish causation), but the Supreme Court cited with approval in Clark Cty. School Dist. cases in which three and four month intervals were insufficient, and noted that where closeness in time is the only evidence, the time must be very close. *532 U.S. at 273-74.* Here, there is nothing to support the causal inference between plaintiff's protected activity and adverse employment action other than the closeness of time. But there is evidence that tends to negate a causal connection. First, plaintiff was not the only employee in the Education Division who was not promoted at that time. Compare Pl. Opp'n, Ex. 120, with Def. Mem., Ex. A. Second, Ms. McGee, who was promoted in March, worked in a different branch of the Education Division than plaintiff. See Def. Mem., Ex. A. And third, defendant has presented evidence that plaintiff and these women were differently situated so as to defeat any connection between their promotion and plaintiff's non-promotion. Plaintiff's effort to build inference pon inference to draw a causal connection between his protected activity and allegedly adverse employment actions is ultimately unpersuasive. Without a stronger showing of a causal connection between plaintiff's non-promotion in 1993 and his protected activity, the Court cannot conclude that plaintiff has established a prima facie case of retaliation on his non-promotion claims.

Even assuming plaintiff could make that showing (which he has not), a retaliation claim follows the McDonnell-Douglas burden-shifting framework, and defendant has offered a legitimate

nondiscriminatory justification for not promoting plaintiff during the 1991 to 1994 period. This is the same evidence discussed at length above -- plaintiff's lack of sufficient responsibilities, his employment problems justifying a letter of reprimand, and his general experience. Plaintiff has not offered any response on the basis of which a reasonable juror could find that defendant's proffered justifications are a pretext for retaliation. Hence, the retaliation claim founded on plaintiff's 1991 to 1994 non-promotion must fail.

Plaintiff's final retaliation claim is that in 1996 he was not promoted along with Ms. Glasco, who had assumed responsibility for many of plaintiff's pre-reorganization duties. Here again, plaintiff has not shown any causal connection between his protected activity and this non-promotion. In fact, plaintiff does not indicate what the specific protected activity is that he believes led to the retaliation. Ms. Glasco was promoted in October 1996, and the most immediate protected activity engaged in by plaintiff was his first EEOC complaint in February 1995. See Am. Compl. P 12. However, that is a significant amount of time (20 months) between the protected activity and the adverse employment action. See *Brodetski, 199 F.R.D. at 20* (courts usually do not accept time lapses over a year to establish causality). Plaintiff does not provide any further evidence to show a connection between this non-promotion and any protected activity. But there is evidence that shows the lack of any causal connection. Ms. Glasco's supervisor, who approved her 1996 promotion, was

not plaintiff's supervisor. See Phleps Aff. P 9. Furthermore, plaintiff was in fact promoted in November 1997, only a year after the challenged non-promotion. Although this is not dispositive on plaintiff's prima facie retaliation claim, given the lack of temporal proximity or other evidence showing a causal connection between plaintiff's 1996 non-promotion and any protected activity, the fact that plaintiff was subsequently promoted casts doubt on his causation claim.

C. Hostile Work Environment

Plaintiff's last claim is for a hostile work environment. He alleges a laundry list of incidents that he argues amount to a hostile work environment.[19] In addition to those incidents already discussed, plaintiff also alleges that: defendant destroyed records of travel vouchers; he received an ultimatum of reassignment or relocation; he received oral and e-mail threatened reprimands; NASA maintains education programs

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[19] Unlike discrete claims of discrimination and retaliation, the exhaustion requirement on a hostile work environment claim is less stringent. Plaintiff need only have filed an EEOC complaint alleging some of the claims that comprise the hostile work environment claim. See *Morgan, 536 U.S. at 122* ("A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.").

separated by race; and he discovered in 1995 a NASA computer with icons containing "racial jokes and stories." See Second Am. Compl. PP 177-192.

To establish a prima facie hostile work environment claim based on race, plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment occurred because of his race; (4) the harassment affected a term, condition or privilege of his employment; and (5) the employer knew or should have known of the harassment, but failed to take any action to prevent it. See *Jones v. Billington, 12 F. Supp. 2d 1, 11 (D.D.C. 1997)*, aff'd, *1998 U.S. App. LEXIS 15459, 1998 WL 389101 (D.C. Cir. June 30, 1998)*. The workplace environment becomes "hostile" for purposes of Title VII only when the offensive conduct "permeate[s] [the workplace] with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998)*; accord *Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)*; see also *Pa. State Police v. Suders, 542 U.S. 129, 159 L. Ed. 2d 204, 124 S.Ct. 2342, 2347 (2004)*; *Clark Cty. School Dist., 532 U.S. at 270-271*; *Holbrook v. Reno, 196 F.3d at 262*.

The key terms, then, are "severe," "pervasive," and "abusive," as not just any offensive or

discriminatory conduct constitutes an actionable hostile work environment. Under *Faragher v. Boca Raton, 524 U.S. 775, 787-88, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)*, in order to determine whether a work environment is sufficiently hostile to be actionable under Title VII, a court should consider: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or merely offensive; and (4) whether the conduct reasonably interferes with the employee's performance.

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, this will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."

Id. at 787 (citations omitted).

Moreover, it must be clear that the hostile work environment was the result of discrimination based on a protected status. As the Second Circuit has explained:

> Everyone can be characterized by sex, race, ethnicity, or (real or perceived) disability; and many bosses are harsh, unjust, and rude. It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack

> a linkage of correlation to the claimed ground of discrimination. Otherwise, the federal courts will become a court of personnel appeals.

Alfano v. Costello, 294 F.3d 365, 377 (2d Cir. 2002). Thus "to sustain a hostile work environment claim . . . [plaintiff] must produce evidence that she was discriminated against because of her [status]." *Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 440 (2d Cir. 1999)* (claim for hostile work environment failed where only three of fifteen alleged incidents had racial overtones); see also *Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 345-46 (7th Cir. 1999)* (hostile work environment claim failed where insufficient evidence that alleged harassing behavior was motivated by discrimination); *Jones v. Billington, 12 F. Supp.2d at 12* (hostile work environment claim failed where plaintiff had "not demonstrated that any of the conduct of which he complains was related to his race, or that his workplace was permeated with racially discriminatory behavior").

Plaintiff has utterly failed to establish a prima facie hostile work environment claim. Considering the totality of the evidence proffered, and drawing all inferences in favor of plaintiffs, there are no genuine issues of material fact, and no reasonable jury could find that plaintiff established a hostile work environment claim. Simply put, plaintiff cannot meet the high burden of showing hostility in the work environment at NASA that was "severe," "pervasive," and "abusive."

First and foremost, many of the incidents cited by plaintiffs are not related to his race or religion, and therefore cannot be used to support a hostile work environment claim. See *Burton v. Batista, 339 F. Supp. 2d 97, 107 (D.D.C. 2004).* In fact, the only incident with explicit racial tones was plaintiff's discovery of icons on a computer that read "racist jokes and stories" and "W/American Heritage." See Pl.'s Response P 14. However, plaintiff acknowledges that those folders were empty, and did not in fact contain racist jokes. Id. Regardless of the racist nature of those icons, it is beyond dispute that they were not directed to plaintiff.' When racial statements are not made directly to a plaintiff, generally a hostile environment cannot be established. See *Lester v. Natsios, 290 F. Supp. 2d 11, 31 (D.D.C. 2003)* ("conduct directed at others rather than at plaintiff .. . is less indicative of a hostile work environment"); *Gleason v. Mesirow Fin'l Inc., 118 F.3d 1134, 1144 (7th Cir. 1997)* ("the impact of second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff").

Another key factor in assessing the pervasiveness of the alleged harassment is the period of time over which the harassment occurred. See *Hopkins v. Baltimore Gas and Elec. Co., 77 F.3d 745, 753 (4th Cir. 1994)* (alleged incidents over a seven-year period suggests the absence of a pervasive condition). In this case, the alleged incidents span from 1991 to 1996. Furthermore, the specific incidents cited by plaintiff occurred

intermittently over that time period: failure to promote in October 1991; a letter of reprimand in July 1994; computer icons in February 1995; an "ultimatum" received in October 1995; travel denied in September 1996; oral and e-mail threats of reprimand received in October and November 1996; and interference with his work by Ms. McGee in December 1996. This history indicates less a pervasive pattern of harassment, and more just isolated employment incidents occurring over a long period of time. An additional factor in the analysis is that plaintiff was in no way physically threatened by any of the alleged incidents. See *Faragher, 524 U.S. at 787-88* (factor in assessing hostility of work environment is whether plaintiff physically threatened). Finally, the bulk of the "hostile" events on which plaintiff relies are the very employment actions he claims are discriminatory or retaliatory; he cannot so easily bootstrap discriminatory claims into a hostile work environment claim. See *Lester v. Natsios, 290 F. Supp. 2d at 33* ("Discrete acts constituting discrimination or retaliation claims . . . are different in kind from a hostile work environment claim that must be based on severe and pervasive discriminatory intimidation or insult.").

Reviewing the totality of the circumstances, including the frequency, nature, severity and offensiveness of the alleged incidents, plaintiffs claim does not meet the threshold of severe, pervasive and abusive discriminatory conduct. All but one of the alleged incidents did not involve racially discriminatory conduct, and that one

incident -- the computer icons-- was not directed at plaintiff and contained no offensive or abusive language. Other courts have deemed circumstances that were much worse than this not to qualify as racial harassment. See *Bryant v. Brownlee, 265 F. Supp. 2d 52, 64 (D. D.C. 2003)* (no hostile work environment when co-worker referred to plaintiff as "nigger" and another co-worker said "black woman were at the bottom. The white men were first, the white women were right up there with them. . . ."); *Skipper v. Giant Food, Inc., 68 Fed.Appx 393, 399 (4th Cir. 2003)* (no racially hostile work environment where plaintiff exposed to daily racist graffiti, overheard white co-workers using racial slurs 13 times over four years, and referred to by manager with a racial slur).

CONCLUSION

For the above reasons, defendant's motion for summary judgment is granted. A separate order is issued on this date.

JOHN D. BATES
United States District Judge

Dated: August 17, 2005

ORDER

Upon consideration of defendant's motions for summary judgment and leave to amend its Answer, plaintiff's motion for leave to file a Surreply, the memoranda of the parties and the entire record herein, and for the reasons stated in the

accompanying Memorandum Opinion, it is this 17th day of August, 2005, hereby

ORDERED that plaintiff's motion for leave to file a Surreply is **GRANTED**; it is further

ORDERED that defendant's motion for leave to file an Amended Answer is **GRANTED**; and it is further

ORDERED that defendant's motion for summary judgment is **GRANTED**, and judgment is entered for defendant.

JOHN D. BATES
United States District Judge

APPENDIX C
Orders of the United States Court of Appeals for the District of Columbia Circuit Denying Rehearing and Rehearing En Banc (filed July 2, 2007)

AHMAD B. NURRIDDIN,
APPELLANT

v.

MICHAEL GRIFFIN, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION,
APPELLEE

No. 05-5386

United States Court of Appeals
for the District of Columbia Circuit

2007 U.S. App. LEXIS 16074

July 2, 2007, Filed

BEFORE: Sentelle, Tatel, and Brown, Circuit Judges

ORDER

Upon consideration of the petition of appellant for rehearing filed May 31, 2007, and the petition of the court-appointed *amicus curiae* for rehearing

filed May 24, 2007, it is ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

AHMAD B. NURRIDDIN,
APPELLANT

v.

MICHAEL GRIFFIN, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION,
APPELLEE

No. 05-5386

United States Court of Appeals
for the District of Columbia Circuit

2007 U.S. App. LEXIS 16075

July 2, 2007, Filed

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh,*
Circuit Judges

ORDER

Upon consideration of the petition of appellant for rehearing en banc, and the petition of court-appointed *amicus curiae* for rehearing en banc, and the absence of a request by any member of the court for a vote, it is ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

* Circuit Judge Kavanaugh did not participate in this matter.

APPENDIX D
NASA EEO Complaint of Discrimination (filed February 7, 1995)

NASA National Aeronautics and Space Administration

Complaint of Discrimination

(Based on Age, Race, Color, Religion, Sex, National Origin or Physical or Mental Handicap)

1. **Complainant's Full Name** Ahmad Bilal Nurriddin
2. **Telephone No.** *(Include Area Code)* a. Home: 202-488-0739 b. Work: 202-358-1517
3. **Home Street Address** *(Or P.O. Box or RD number)* 700 – 7th Street, SW
4. **City and State** *(Including Zip Code)* Washington, DC 20024
5. **NASA Office You Believe Discriminated Against You**
a. Name of Office Education Division

b. Address *(Street name and number, city, State and ZIP Code)* 300 – E Street, SW Washington, DC 20546
6. **Name of Representative** Eddie Anderson and Frank Owens
7. **Address of Representative** 300 – E Street, SW
8. **Employment Data**
a. Now Working in the Federal Government X (1). YES *(If checked, complete items 8b through 8d)* (2). NO *(If checked, continue in item 9)*
b. Agency Name *(Include your organization designation, job title and grade)* Elementary and Secondary Branch, Education Division, Publications Specialist, GS-12
c. Street Address *(Or P.O. Box or RD number)* 300 – E Street, SW
d. City and State *(Including ZIP Code)* Washington, DC 20546
9. **Date Most Recent Alleged Discrimination Took Place**

a. Month July
b. Day
c. Year
10. Reason Why You Believe You Were Discriminated Against
a. Because of Retaliation I complained about discrepancies in my employment status and was retaliated against.
b. Because of Race *(Specify)* I am African American.
c. Because of Color *(Specify)*
d. Because of Religion *(Specify)*
e. Because of Sex *(Specify)*
f. Because of National Origin *(Specify)*
g. Because of Physical or Mental Handicap *(Specify)*

11. **Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Age, Race, Color, Religion, Sex, National Original or Physical or Mental Handicap**

I was discriminated against because I am African American and I encountered retaliation because as an African American I protested the discriminatory treatment up the chain of command to the Associate Administrator for Human Resources and Education.

On July 14, 1994 my immediate supervisor Dr. Edward Anderson, African American male, issued to me a reprimand for allegedly disobeying orders when I took annual leave June 28, 1994 – July 8, 1994. A copy of the reprimand and my response is attached.

The condition upon which I was to be allowed to take annual leave was that I complete three assignments. I completed them. Based upon that, Ms. Muriel Thorne, who was serving as my acting supervisor approved my leave and I took it. Attached are three leave slips for the subject period.

One signed by Ms. Thorne, which was made available to me prior to taking the leave and two signed by Dr. Anderson, both were placed in my office mailbox during the time that I was away from the office. The time away from the office included travel duty subsequent to the leave. Ironically, the travel authorization was approved by Dr. Anderson during the period that I allegedly was away on unapproved leave. The travel authorization is

attached.

It is my belief that the reprimand was issued to me by my supervisor because of my race, African American, and in retaliation for my having protested the discriminatory manner in which I have been treated since my conversion to civil service. Initially, my protest was registered with Mr. Frank Owens, white male. At the time of my initial protests, Mr. Owens was the office official who managed the conversation from contractor status to civil service for three individuals, Pam Bacon, a white female, Julius Dasch, white male, and my self. I was converted to government status two grades lower than these individuals and at the present time the disparate status rating remains.

In the last several years, I have on occasion taken my allegations of discrimination up the chain of command to the Division Director, Frank Owens, to the former Deputy Associate Administrator for Human Resources and Education, Dr. Robert Brown, and to the Associate Administrator for Human Resources and Education, General Spence Armstrong.

Despite the fact that for two of the four years that I have worked in the Education Division, I have been rated as Highly Successful, I have never been promoted. This year, I received a Satisfactory Rating, in large part due to the reprimand and subsequent complaint. For one year I was not given a performance rating. Other individuals, Sherri McGee, white female and Deborah Galloway, white female, have both been promoted to GS-14, during this time period.

One of the assignments that the Reprimand alleges that I was required to complete is a Turner School Plan. Deborah Galloway, white female, was initially assigned the Turner Elementary School project but refused the assignment after approximately 2.5 months involvement. There was no adverse action taken against Ms. Galloway.

Another allegation in the Reprimand is that the Contracts Office was unsatisfied with my performance as Contracting Officer Technical Representative (COTR). The fact is that Dr. Anderson interfered with the performance of my responsibilities to the extent that the Contracting Officer, Ms. Nancy Porter terminated my appointment as COTR when it became clear that the interference was increasing. Communications with Ms. Porter are attached.

The same interference with contract management is not exhibited towards Larry Billbrough, white male, who has several Oklahoma State University contractor staff members executing various aspects of his assignments including, but not limited to processing official government documents and serving as personal office assistants.

In a staff meeting, while Dr. Anderson was talking about NASA HQ downsizing he stated that several factors would be considered and that those creating problems might not be around and referred to an earlier meeting with Mr. Owens. I was the only staff member attending the meeting earlier that morning with Dr. Anderson and Mr. Owens.

12. I Have Discussed My Complaint With An Equal Employment Opportunity Counselor *(See Instructions)*
X a. Yes. b. No.
c. Name of Counselor *(if item 12a checked)* Brenda Brush
13. Corrective Action You Want Taken On Your Complaint I seek promotion to grade GS-14; compensation for lost wages plus interest; removal of the disparaging letters from my personnel records; attorney fees; and a letter of apology from Mr. Owens and Dr. Anderson.
14. Date of Complaint (Mo., day, year) Feb. 7, 1995
15. Signature of Complainant Ahmad Nurriddin /s/

FILED
JAN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-722

In the Supreme Court of the United States

AHMAD B. NURRIDDIN, PETITIONER

v.

MICHAEL GRIFFIN, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
MARLEIGH D. DOVER
JEFFREY CLAIR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether or to what extent a plaintiff alleging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964 must exhaust administrative remedies with respect to each discrete, allegedly unlawful employment practice before filing suit in federal court.

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In the Supreme Court of the United States

No. 07-722

AHMAD B. NURRIDDIN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 222 Fed. Appx. 5. The opinion of the district court (Pet. App. 4-61) is reported at 382 F. Supp. 2d 79.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2007. A petition for rehearing was denied on July 2, 2007 (Pet. App. 63-65). On September 26, 2007, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including November 29, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964 (the Act), 42 U.S.C. 2000e *et seq.*, requires "[a]ll personnel actions affecting employees or applicants for employment," in the Federal Government to be "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) (Supp. IV 2004). The Act authorizes the Equal Employment Opportunity Commission (EEOC) to enforce those non-discrimination provisions. 42 U.S.C. 2000e-16(b). The Act further authorizes the EEOC to issue regulations governing each federal agency's administrative procedures for investigating and acting upon complaints of discrimination. *Ibid.*

EEOC regulations provide that an aggrieved employee must first attempt to resolve the matter informally by consulting with an equal employment opportunity counselor before filing a complaint against the agency. 29 C.F.R. 1614.105(a). The employee must initiate contact with an agency counselor within 45 days of the allegedly discriminatory act or, in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. 1614.105(a)(1).

At the initial counseling session, counselors must advise employees in writing of their rights and responsibilities, including their right to request a hearing or an immediate final decision after an investigation by the agency, their duty to mitigate damages, and the administrative and court time frames governing administrative and judicial review. 29 C.F.R. 1614.105(b)(1). Counselors must also advise the employee that only claims raised in pre-complaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent

complaint. *Ibid.* If the matter is not resolved in a timely manner through those informal procedures, the counselor must inform the employee in writing of the right to file a formal complaint of discrimination. 29 C.F.R. 1614.105(d).

An administrative complaint of discrimination must be filed within 15 days of the notice issued pursuant to Section 1614.105(d). 29 C.F.R. 1614.106(b). The administrative complaint must contain a signed statement sufficiently precise to identify the aggrieved individual and the agency and to describe generally the actions or practices that form the basis of the complaint. 29 C.F.R. 1614.106(c). The complaint may be amended at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. 29 C.F.R. 1614.106(d). The complaint may also be amended after a request for an administrative hearing, upon a motion filed with the administrative judge to include issues or claims like or related to those raised previously. *Ibid.*

The agency is required to conduct an impartial and appropriate investigation of the complaint and must generally complete its investigation within 180 days of the filing of the complaint, unless the parties agree in writing to extend the time period. 29 C.F.R. 1614.106(e)(2), 1614.108(e). At the conclusion of its investigation, the agency must turn over the investigative file to the complainant and notify the aggrieved person of his right to either an evidentiary hearing before an administrative judge (see 29 C.F.R. 1614.109) or to an immediate, final agency decision. 29 C.F.R. 1614.108(f).

If the employee requests a hearing, the agency must issue a final decision within 40 days of receipt of the hearing file. 29 C.F.R. 1614.110. The final order must

state whether the agency will fully implement the decision of the administrative judge, and it must also notify the complainant of the right to appeal the final agency decision to the EEOC, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. *Ibid.*

An aggrieved person may file a civil action in federal district court within 90 days of receipt of notice of a final agency decision or notice of a final EEOC decision on an appeal from the agency's final decision. 42 U.S.C. 2000e-16(c). If, however, the agency has failed to issue a timely final decision in the first instance, the complainant may bring a civil action 180 days after the filing of the initial charge with the agency. *Ibid.* (incorporating 42 U.S.C. 2000e-5(f)).

The above-described administrative remedies must be timely invoked and exhausted before a civil action may be filed. *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109-110 (2002). As the Court has explained, "by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action," Congress intended to "encourag[e] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *West* v. *Gibson*, 527 U.S. 212, 218-219 (1999). An aggrieved employee must accordingly timely exhaust administrative remedies before bringing discrimination claims to court. 42 U.S.C. 2000e-16(c); *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976).

2. At the times pertinent here, petitioner was an employee of the National Aeronautics and Space Administration (NASA). Pet. App. 5-10. In December 1994, petitioner contacted an equal employment opportunity

counselor at NASA to complain of unlawful discrimination and retaliation. *Id.* at 8. He filed a formal administrative complaint of racial discrimination on February 9, 1995. *Id.* at 67. He alleged that he had been issued an unwarranted reprimand; that he had been initially converted from a contractor to government employee at a lower pay grade than similarly situated contract workers; and that he had been improperly denied promotions over the four years of his employment—all because he is an African-American. *Id.* at 70-71.

On November 5, 1996, petitioner again contacted an equal employment opportunity counselor to complain of discrimination. He filed a second administrative complaint on April 3, 1997. Petitioner alleged that he had been subject to a hostile work environment, citing the denial of a promotion, denial of travel opportunities, various e-mailed and oral admonishments and threats of reprimand, and supervisory interference with petitioner's ability to perform various tasks. The two administrative complaints were consolidated for investigation. On September 21, 1999, NASA issued a final agency decision, finding that NASA had not discriminated or retaliated against petitioner. Pet. App. 10.

3. Petitioner subsequently filed a civil action against the Administrator of NASA alleging that the agency had violated Title VII. The complaint, as amended, alleged that NASA had discriminated against petitioner in denying him a promotion and making certain other personnel decisions, that those actions amounted to retaliation, and that petitioner had been subjected to a hostile work environment. Pet. App. 16-17.

The district court, ruling on the government's motion for summary judgment, entered judgment for the government. The court first found that petitioner had not

exhausted administrative remedies with respect to alleged discrimination in certain decisions concerning initial hiring, work assignments, performance ratings, and promotion determinations. Pet. App. 20-23. The court observed that petitioner conceded that those matters had not been brought to the attention of an agency equal employment opportunity counselor. *Id.* at 22. The court explained that, under *Morgan*, *supra*, an aggrieved employee must exhaust administrative remedies with respect to each discrete act of discrimination before these acts may be challenged in court, and concluded that petitioner's claims were barred "to the extent that these allegations are claims of discrete discrimination or retaliation." Pet. App. 23. The court explained, however, that petitioner's failure to exhaust administrative remedies did not bar petitioner from alleging the same agency actions in support of his hostile work environment claim. *Id.* at 21 n.11.

The court further held that the government was entitled to judgment as a matter of a law on the merits of the remaining claims. It found that some of the claims did not challenge an actionable, adverse employment action (Pet. App. 26, 44), that the government had established a legitimate nondiscriminatory reason for other challenged personnel actions (*id.* at 27-28, 31, 38), that petitioner had not established a prima facie case of retaliation because he had not shown a causal connection between protected activity and adverse employment decisions (*id.* at 53), and that petitioner had not shown the severe, pervasive and abusive conduct necessary to establish a prima facie case for a hostile work environment claim (*id.* at 58).

4. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-3. The court sum-

marily agreed with the district court's holding that several of petitioner's claims were not fully exhausted, and that the others were not supported by sufficient evidence to survive summary judgment. *Id.* at 2-3.

ARGUMENT

The court of appeals' unpublished decision is correct, in accordance with this Court's decisions requiring Title VII claimants to exhaust administrative remedies as to discrete discriminatory acts before commencing suit, and consistent with other appellate authority addressing the scope of exhaustion requirements after *Morgan*, *supra*. To the extent that petitioner argues that the claims at issue did not involve *discrete* acts of alleged discrimination, that conclusion is fact-bound. Further review is therefore unwarranted.

1. In *Morgan*, this Court concluded that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002). In so holding, the Court specifically rejected assertions that, under the "continuing violation" doctrine, exhaustion of administrative remedies with respect to one particular act permits a claimant to raise in a court suit, and without further resort to administrative remedies, additional acts that are plausibly or sufficiently related. *Id.* at 114. The Court reasoned that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify" and concluded that "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'" as to which timely exhaustion of administrative remedies is required. *Ibid.*

The Court distinguished discrete discriminatory acts from acts that create a hostile work environment. It reasoned that such claims involve repeated conduct that may stretch over a period of time, and that a single act contributing to a hostile work environment may not be independently actionable. *Morgan*, 536 U.S. at 115. The Court accordingly concluded that, while a hostile work environment claim will not be barred if administrative remedies are timely invoked with respect to one of the contributing acts, a "plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time." *Id.* at 122.

This Court reiterated those principles in *Ledbetter* v. *Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). It stated that, under *Morgan*, "[a] discrete act of discrimination is an act that in itself constitutes a separate actionable unlawful employment practice and that is temporally distinct." *Id.* at 2175 (internal quotations omitted). And the Court concluded that when an employee challenges a series of personnel actions as to allegedly discriminatory pay, each of which is independently identifiable and actionable, a timely administrative charge must be filed with respect to each alleged violation. *Ibid.*

The decision below, in summarily affirming the district court's judgment, is fully consistent with this Court's decisions. The district court found that petitioner had not invoked administrative remedies with respect to claims that he had been hired on discriminatory terms, denied a promotion, and subjected to discriminatory treatment in work assignments and performance evaluations. Pet. App. 20-23. Applying *Morgan*, the court held that "*to the extent that these allegations are claims of discrete discrimination or retaliation,*

they are barred for a failure to exhaust administrative remedies." *Id.* at 23 (emphasis added). At the same time, the trial court made clear that exhaustion would not be required with respect to every personnel action alleged to contribute to the alleged hostile work environment as long as petitioner had invoked administrative remedies with respect to at least one of the contributing acts. *Id.* at 21 n.11 & 55 n.19.

2. Petitioner asserts that the courts of appeals are divided over whether Title VII claimants must exhaust administrative remedies with respect to allegedly discriminatory acts that follow—and are "related to," Pet. 10—the discriminatory acts raised in a prior administrative charge of discrimination. Pet. 12-23. Petitioner argues that *Morgan*'s exhaustion requirements are limited to pre-charge conduct, and that "[a] majority of the * * * courts of appeals * * * permit plaintiffs to bring suit on any uncharged subsequent conduct that is reasonably related to charged conduct." *Id.* at 12.

To the extent that petitioner suggests that the claims at issue in this case do not involve discrete acts of discrimination (but rather "related" and non-discrete acts), he is mistaken and the conflict he attempts to frame is not implicated by this case. As discussed, the district court held that the claims at issue should be dismissed for lack of exhaustion "to the extent that * * * [they] are claims of *discrete* discrimination or retaliation." Pet. App. 23 (emphasis added).

Nothing in *Morgan* suggests that exhaustion may be excused with respect to discrete unlawful employment practices merely because the alleged discrimination occurs *after* an initial administrative charge is filed. Accordingly, and contrary to petitioner's contentions, no appellate authority purports to dispense with exhaustion

requirements for discrete, independently actionable conduct, regardless or whether the discrete act of discrimination occurs before or after an act identified in a prior charge.

In *Martinez* v. *Potter*, 347 F.3d 1208 (2003), for example, the Tenth Circuit held, consistent with the holding below, that *Morgan* requires exhaustion of administrative remedies with respect to each discrete, independently actionable incident of alleged discrimination. The court of appeals thus concluded that *Morgan* abrogates the "continuing violation" doctrine as applied to claims of discrimination and retaliation and "replaces it with the teaching that each discrete incident of such treatment constitutes its own 'unlawful employment practice' for which administrative remedies must be exhausted." *Id.* at 1210.

Petitioner asserts that, in reaching a similar holding, the court below has adopted a construction of *Morgan* that is in direct conflict with *Wedow* v. *City of Kansas City*, 442 F.3d 661 (8th Cir. 2006), and other appellate authority. Pet. 12-16. *Wedow* and the other cases cited by petitioner, however, have excused exhaustion only with respect to certain narrow categories of subsequent discriminatory conduct that are *closely related* to a prior charge. None of these cases purports to dispense with exhaustion for discrete, independently actionable instances of discrimination—*i.e.*, the kind of claims at issue here. Pet. App. 23.

In *Wedow*, for example, the Eighth Circuit addressed sex discrimination claims raised by female firefighters. The firefighters alleged that their city employer had discriminated against them by failing to provide adequate protective clothing and adequate bathroom and changing facilities, and by engaging in an ongoing retali-

ation against them for seeking redress for this alleged discrimination. 442 F.3d at 666-667. With respect to the discrimination claim, the court of appeals, following *Morgan*, and consistent with the holding below, held that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 670 (internal quotation marks omitted). With respect to the retaliation claim, the court of appeals held that where an initial administrative charge alleged retaliatory acts that were on-going and continuing in nature, exhaustion was not necessary with respect to subsequent retaliatory acts that are of a like kind. *Id.* at 673-674. The Eight Circuit reasoned that where a prior administrative charge alleges continuing and on-going retaliation, subsequent retaliatory actions can be deemed to be reasonably within the scope of the investigation that would be expected to grow out of the initial charges, and resort to administrative remedies for each related, retaliatory act would not be required. *Ibid.*

Petitioner argues that the decision below conflicts with *Wedow*'s holding on subsequent retaliatory actions related to a prior charge of retaliation. The retaliatory actions here, however, are not similarly related to an administrative charge of on-going retaliatory action. Rather, the district court characterized petitioner's claims as a "laundry list of allegedly discriminatory incidents" (Pet. App. 16) which, in the case of petitioner's retaliation claim, merely "reclassifie[d] his allegations of discrimination as claims of retaliation" (*id.* at 17). Similarly, the district court held that petitioner's claims were barred for lack of exhaustion only "to the extent that [petitioner's] allegations are claims of *discrete* discrimi-

nation or retaliation." *Id.* at 23 (emphasis added). The court's fact-bound characterization of petitioner's claims as "[d]iscrete"—rather than closely related—acts of discrimination does not warrant this Court's review. Thus, unlike *Wedow*, this case does not involve retaliatory actions that are closely related to a prior charge of on-going retaliatory conduct.

Nor does the decision below conflict with precedent from other circuits. As an initial matter, the decision below—as well as many of the other appellate decisions cited by petitioner (Pet. 14-15)—are unpublished decisions that do not establish circuit precedent on the scope of *Morgan*'s exhaustion requirements. See *Delisle* v. *Brimfield Twp. Police*, 94 Fed. Appx. 247 (6th Cir. 2004) (unpublished); *Neiderlander* v. *American Video Glass Co.*, 80 Fed. Appx. 256 (3d Cir. 2003) (unpublished); *Eberle* v. *Gonzales*, 240 Fed. Appx. 622 (5th Cir. 2007) (unpublished). Those decisions, as well as the decision below, do not set forth binding circuit law on the question presented by petitioner.

In addition, the decision below is not only non-precedential, but it summarily affirms the district court's conclusion that "after a thorough review of the evidence and the applicable legal standards, * * * several of [petitioner's] claims were not fully exhausted, and that the others were not supported by evidence sufficient to survive summary judgment." Pet. App. 2-3. There is no independent analysis of the question presented that could guide courts in other cases.

Moreover, the other, precedential decisions cited by petitioner, like *Wedow*, only excuse exhaustion with respect to certain narrowly defined conduct that is closely related to a prior charge. *Terry* v. *Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003) (exhaustion excused for acts

within scope of investigation reasonably expected to grow out of prior charge, acts of retaliation for filing prior charge, and incidents of discrimination carried out in "precisely the same manner" as acts in prior charge); *Lyons* v. *England*, 307 F.3d 1092, 1104 (9th Cir. 2002) (exhaustion not required with respect to subsequent acts that fall within the scope of investigation that can reasonably be expected to grow out of prior charge).* None of these authorities purports to dispense with settled exhaustion requirements for discrete instances of alleged discrimination that bear no close connection to the acts identified in a prior administrative charge—*i.e.*, the kind of alleged unlawful acts at issue here.

3. Petitioner alleges that review by this Court is needed as a practical matter. But especially in the absence of circuit conflict, not to mention a court of appeals' decision squarely addressing any conflict, there is no reason for this Court to grant certiorari here. And even in those circuits that have addressed the question presented, plaintiffs may protect their interest by following the rule embraced by this Court in *Morgan* and exhausting administrative remedies as to discrete allegation of unlawful discrimination.

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* *Rivera* v. *Puerto Rico Aqueduct & Sewers Authority*, 331 F.3d 183 (1st Cir. 2003), also cited by petitioner (Pet. 14-15), is not to the contrary. The court of appeals in that case observed that *Morgan* does not address whether a previously filed administrative complaint must be amended to encompass subsequent discrete acts in order to render such acts susceptible to judicial review. 331 F.3d at 189. But the court of appeals expressly declined to decide whether a judicial complaint of discrimination may encompass non-retaliatory but related discrete acts which took place after the discriminatory act described in the administrative charge. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
MARLEIGH D. DOVER
JEFFREY CLAIR
Attorneys

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(3)

No. 07-722

In the Supreme Court of the United States

AHMAD B. NURRIDDIN,
Petitioner,

v.

MICHAEL GRIFFIN, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

PAUL M. THOMPSON
Counsel of Record
KELLY M. FALLS
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner

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REPLY TO BRIEF IN OPPOSITION

Properly understood, the government's brief fails to rebut Petitioner's arguments in favor of review. First, the government disregards the clear and undisputed split between the circuits over the meaning of this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Second, it incorrectly concludes that the instant case is "fact-bound" by misreading the word "discrete" as synonymous with "unrelated." Finally, it unfairly dismisses the impact this legal conflict has on the even-handed administration of federal civil rights laws. For the reasons set forth below, this Court should grant the petition, resolve the conflict present in the lower courts, and restore the proper interpretation of Title VII's exhaustion requirements.

1. The government disregards a clear circuit split by claiming that "no appellate authority purports to dispense with the exhaustion requirements for discrete, independently actionable conduct [that occurs] after an act identified in a prior charge." Br. in Opp. 9–10. This assertion is flatly wrong.

Since *Morgan*, the courts of appeals have acknowledged that a split exists as to whether *Morgan*'s exhaustion rule applies to acts of discrimination that occur *after* a charge is filed and are related to the charged conduct. Pet. 13–16. Even the EEOC—the federal agency charged with interpreting and administering Title VII—has

agreed that the circuits are in conflict on this very point. *See* Pet. 15–16, 27; EEOC COMPLIANCE MANUAL § 2-IV, at n.186 ("The Commission disagrees with [*Martinez v. Potter*]. . . . *Morgan* does not affect existing case law that permits subsequent related acts to be addressed in an ongoing proceeding.") (citing *Delisle v. Brimfield Twp. Police*, 94 Fed. App'x 247 (6th Cir. 2004)). In its opposition brief, the government does not once cite or explain the EEOC's guidance on this point—a telling omission.

Furthermore, the government's denial of the circuit split contradicts the plain holdings of the relevant cases. In *Wedow v. City of Kansas City*, the Eighth Circuit expressly rejected the argument that "the [*Morgan*] rule applies with equal force to discrete acts of discrimination that occur subsequent to a timely filed EEOC charge," concluding that "related subsequent acts may be considered exhausted." 442 F.3d 661, 673 (8th Cir. 2006). Similarly, in *Lyons v. England*, the Ninth Circuit held that exhaustion of a discrete post-filing claim of non-promotion was not required because it was sufficiently related to an exhausted claim of non-promotion, 307 F.3d 1092, 1104–1105 (9th Cir. 2002)—even though *Morgan* states that "failure to promote" is a "[d]iscrete" act, 536 U.S. at 114. And in *Delisle v. Brimfield Township Police*, the Sixth Circuit did not require separate exhaustion of a post-filing retaliatory demotion claim because it was "reasonably related" to exhausted conduct, even though the subsequent claim was independently actionable. 94 Fed. App'x at 254. Each of these

courts reached the precise conclusion that the government claims has never been held—discrete, independently actionable conduct occurring after an EEOC charge need not be separately exhausted if it is related to conduct raised in the prior charge.

These authorities are directly at odds with *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003), which the government contends is the controlling law in this case. Br. in Opp. 7, 10 (stating "[t]he court of appeals' unpublished decision was correct" and *Martinez* is "consistent with the holding below"). In *Martinez*, the Tenth Circuit held that *Morgan* requires separate exhaustion of "discrete claims based on incidents occurring after the filing of [a p]laintiff's EEOC complaint," regardless of whether or not they are related to claims raised in the filed charge. 347 F.3d at 1211–1212. *Martinez* thus stands in irreconcilable conflict with *Wedow*'s contrary holding.

These authorities demonstrate that there is a very real split in the circuits over the meaning and reach of *Morgan*, which only this Court can resolve.

2. The government attempts to downplay the relevance of this circuit split by recharacterizing the issue in this case as "fact bound." Br. in Opp. 7. To do so, however, it takes three tortuous logical steps. First, it contends that the cases cited by Nurriddin—*Wedow*, for example—only apply to "certain narrow categories of subsequent discriminatory conduct that are *closely related* to a prior charge." Br. in Opp. 10 (emphasis added). Next, it

argues that Nurriddin's claims are not "*closely related*" to the claims that he filed with the EEO—rather, they are "discrete." Br. in Opp. 9, 12–13. Finally, it seizes on the district court's statement that Nurriddin's claims are "claims of *discrete* discrimination or retaliation" and argues that this "fact-bound characterization" makes this case unworthy of this Court's review. Br. in Opp. 12 (emphasis added).

The government's argument, however, relies on a definition of the word "discrete" that is contradicted by this Court's Title VII jurisprudence. In *Morgan*, this Court used "discrete" as a term-of-art, referring to independently actionable claims of discriminatory or retaliatory employment practices. 536 U.S. at 114. Thus, "discrete" does not mean "unrelated" as the government contends—a claim can be legally "discrete" and still be related to another claim. Indeed, the *Morgan* Court acknowledged that "discrete" acts could share a "connection" with other acts, *id.* at 111, and that circuit courts had relied upon such connections to forgive the failure to exhaust related acts separately, *id.* at 104. Though the Court rejected such an exhaustion rule with respect to related claims that occurred well *before* the filing of an EEOC charge, it did not address whether "discrete" claims could be sufficiently related for exhaustion purposes in other circumstances.

In this case, Nurriddin's claims of post-charge discriminatory and retaliatory non-promotion were based on circumstances identical to those alleged to

the EEO. Pet. 30–32. Nurriddin argued below that his post-charge claims of discriminatory and retaliatory non-promotion, even if independently actionable and therefore "discrete" under *Morgan*, were nevertheless *related to* the discrete non-promotion claims raised in his 1995 EEOC charge, and therefore should be deemed properly exhausted. Pet. App. 22. Nothing in *Morgan* requires that a discrete act of discrimination be "unrelated" to any other act of discrimination. The district court's use of the word "discrete," therefore, does nothing to remove this case from the heart of the existing circuit split.

Courts that have delved into the current split seem to have rejected the government's arguments. First, they have uniformly viewed their conflicting decisions as opposing answers to a legal question—not a fact-bound dispute. *See, e.g.*, *Wedow*, 442 F.3d at 673–674 (noting conflict between *Martinez* and *Delisle*); *Weber v. Battista*, 494 F.3d 179, 184 (D.C. Cir. 2007) (noting conflict between *Wedow* and *Martinez*); *Jones v. Univ. of D.C.*, 505 F. Supp. 2d 78, 84 (D.D.C. 2007) (same). Second, they have specifically held subsequent related acts to be exhausted, even when they also amount to "discrete" acts of discrimination. *Wedow*, 442 F.3d at 673 (subsequent discrimination claims exhausted); *Lyons*, 307 F.3d at 1104–1105 (subsequent non-promotion exhausted); *Delisle*, 94 Fed. App'x at 254 (subsequent demotion exhausted). Just as the government's bold statement that there is no split defies the current legal landscape, its effort to

recharacterize the split in order to avoid review of this case is without merit.

3. Finally, the government claims that this Court's intervention is unwarranted as a practical matter, because "in those circuits that have addressed the question presented, plaintiffs may protect their interest by following the rule embraced by this Court in *Morgan*." Br. in Opp. 13. Such a position is naïve, at best.

Even to the informed plaintiff, it is not clear how or why *Morgan* applies to post-filing conduct. Several courts of appeals have expressly concluded that *Morgan* has *no relevance* to the question presented. *See, e.g.*, *Delisle*, 94 Fed. Appx. at 253 ("[Applying] the *Morgan* holding to the facts of this case is inapposite."); *Rivera v. Puerto Rico Aqueduct & Sewers Auth.*, 331 F.3d 183, 189 ("*Morgan* does not address whether a previously filed EEOC complaint must be amended to encompass subsequent discrete acts in order to render such acts susceptible to judicial review."). The government's insistence that *Morgan* is controlling—an opinion as to the proper *resolution* of the circuit split—does nothing to obviate the need for this Court to review the *conflict* between the government's position and contrary circuit court precedent.

But even if the government's claim that *Morgan* controls were correct, the brief in opposition disregards the fact that the bulk of Title VII claimants proceed before the EEOC without representation—much less representation that would

counsel them to disregard clear circuit precedent. Instead, these *pro se* claimants rely upon the EEOC to guide them through the process of filing an administrative charge. Yet the EEOC instructs plaintiffs that "[a] timely charge also may challenge incidents that occur *after* the charge is filed" and "*nothing* in *Morgan* suggests that a new charge must be filed when a charge challenging related acts already exists." EEOC COMPLIANCE MANUAL § 2-IV & n. 186 (emphasis added). It strikes at the very heart of Title VII for the government to first instruct claimants that they need not separately exhaust related claims during the administrative review process, only for the government to later disavow such guidance and argue that such claims should be dismissed from court.

Without this Court's intervention, an untenable status quo will continue unchecked: The circuit courts will remain divided on an issue of national importance, subjecting even diligent plaintiffs to the uneven administration of civil rights. The instant case offers a clear opportunity for the Court to address this longstanding confusion and provide would-be plaintiffs, the government, and the lower courts with the guidance they need.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, this Court should grant the petition.

Respectfully submitted,

PAUL M. THOMPSON
Counsel of Record
KELLY M. FALLS
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner

February 12, 2008